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THE Kentucky case, published in full with note in this week's issue, is an interesting study, even if, on account of the scarcity of such litigation, it is not of very great practical value. A question upon which men like Lord Campbell, Lord Justice Brett, Lord Selborne, Mr. Justices Crompton and Earl, on the one side and Mr. Justice Coleridge and Lord Coleridge on the other, came to opposite conclusions, is, to say the least, one not easy of solution. Whether a suit for damages may be maintained for malicious interference by a stranger with the performance of a contract, is the question presented, and though there are some who will agree with the Kentucky court in denying such right of action, the modern sentiment in England, if not in this country, is favorable to it.

SOME time ago we advanced the opinion that the international copyright bill is intended to promote the interests of American authors, publishers and readers, but that above all, it would enhance national self respect and repute. The editor of the *Chicago Legal Adviser*, at the time, took vigorous issue with this position and seemed to find it difficult to imagine how the measure could enhance national self respect and reputation, asserting that it was only in the interest of publishers. A glance at the columns of a recent issue of that paper reveals to us, for the first time, perhaps the real ground of objection, on the part of that paper, to the international copyright bill and leads us to believe that its opposition extends in fact, to any copyright measure; for we find in the issue referred to, an article written for, and published by us some weeks ago, on the subject of the "Torrens Land Transfer," which is copied into the *Legal Adviser* word for word, without any credit whatever. We are pleased of course, that the *Legal Adviser* should have thought the article worthy of reproduction, as it undoubtedly was, being a well prepared essay by a gentleman of ability, on a subject of current interest, especially in the State of Illinois where the question of reform in land transfers has been recently started by the State Bar Association. But in reproducing it entire, without proper credit, and placing it before its readers as an original article, the *Adviser* demonstrated that it had no regard either for the laws of copyright or for the laws of courtesy.

We observe also, that in issues of that paper, many of our Notes of Recent Decisions are printed without credit to us. We make no claim to any particular originality in the selection or review of current opinions of the courts, but if the *Adviser* thinks them worth the using, we consider that we are at least entitled to the credit.

IN a recent issue (p. 49), we called attention to a decision of Judge Gresham, involving the liability of bank correspondents in the collection of drafts, which was in effect a departure from old and established rules and which placed upon a bank to whom a draft is sent for collection, the duty of seeing that the money collected thereupon reaches its final destination. The effect of the decision in that case was to make a bank, undertaking the collection of a draft, an insurer or guarantor of the fund. A study of that case, however, will disclose a ground upon which the decision might have been placed, without resorting to a rule which is not only subversive of established banking customs but which seems too strict an application of the doctrine of agency. In that case the defendants were guilty of such negligence in the transmission of the fund as should make them liable for its loss. The authorities upon this question, though conflicting and in many instances squinting at, if not actually upholding the doctrine that the collecting bank is an absolute guarantor of the fund, may and should be reconciled upon the more reasonable doctrine of negligence. A late case—St. Nicholas Bank v. The State National Bank—decided by the New York Supreme Court is illustrative of this position. There the plaintiff having a draft to be collected in Dallas, Texas, transmitted it to defendant, a banking corporation of Memphis, Tennessee. The defendant sent it to their regular correspond-

ents at Dallas, who duly presented it and received the money, and remitted same to defendant by sight draft, on a banking concern in New York, and defendant forwarded this same draft to plaintiff. Before it could be presented for payment in New York, however, both the drawer and the drawee failed, and the money was lost.

The court, upon an examination of the authorities, conclude that in most if not all the cases, there was a distinct act of misconduct or neglect producing the loss, while in the present case, there was neither wrong, inattention nor carelessness on which the liability of the defendant could be placed. But the prevailing mode of transmitting the fund collected was followed. Neither did the defendant or its agent retain the money, which act was the ground of liability in some cases. On the contrary, both the defendant and its correspondent promptly remitted the proceeds by the means usually taken. In fact, there was an entire absence of wrong or negligence on the part of either bank, and the money was lost through inevitable accident; a defense, which, according to Judge Gresham, would not be tenable even in a case like the present.

This decision appeals at least to common sense. It is unjust to saddle upon a bank guilty of no actual carelessness, a loss resulting from the carelessness of another or from inevitable accident. It is true, that if the law of principal and agent is to be followed to its logical conclusion, the Memphis bank in this case might be held liable. But the principle laid down by Judge Daniels, who rendered the decision, is wholesome and is only another illustration of the power of the common law to adapt itself to the changes which go hand in hand with advancing civilization.

NOTES OF RECENT DECISIONS.

CARRIERS OF GOODS—NEGLIGENCE—PROXIMATE CAUSE—ACT OF GOD.—In Blythe v. Denver & R. G. Ry. Co., 25 Pac. Rep. 702, decided by the Supreme Court of Colorado, which was an action against a railroad company to recover the value of an express package, it appeared that the express car, with three others, was blown from the track by a gale, into such a position that all the goods must have been thrown into one corner at the top; that the car was immediately set on fire by coals from the stove, and burned so rapidly that the messenger escaped with difficulty; and that the wind was so fierce as to make it almost impossible to stand or walk, and the air so full of dust that one could scarcely see. It was held sufficient evidence to support a finding that the proximate cause was the "act of God," and not the failure of the company to remove the goods after the car was overturned. Upon the subject of proximate cause, Reed, C., says:

Great ability and research have been expanded in attempting to arrive at and determine upon some general definition of the terms "proximate" and "remote" causes and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing. But, in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines "proximate cause," "that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause." And. Dict. Law: "The nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation, or dominant cause." But with these definitions in view, when two causes unite to produce the loss, the question still remains, which was the proximate cause? In Insurance Co. v. Tweed, 7 Wall. 52, the late lamented Mr. Justice Miller said: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations." In Howard Fire Ins. Co. v. Norwich & N. Y. Transp. Co., 12 Wall. 199, in delivering the opinion of the court, Mr. Justice Strong said: "And certainly, that cause which set the other in motion, and gave to its efficiency to do harm at the time of the disaster, must rank as predominant." In Railroad Co. v. Kellogg, 94 U. S. 475, it is said: "The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury." In Insurance Co. v. Boon, 95 U. S. 130, it is said: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

DESCENT AND DISTRIBUTION — DEATH IN COMMON DISASTER — SURVIVORSHIP — PRE-

SUMPTION.—A question of presumption of survivorship, where two or more perish in a common disaster, came before the Court of Appeals of Maryland, in Cowman v. Rogers, 21 Atl. Rep. 64. It was there held that where the member of a benefit association, whose certificate is payable to his wife, or, in case of her death in his life-time to his children, or, if there be no children to his mother, and if she be dead to his father, and failing all these to his brothers and sisters, perishes in a flood with his wife and children, there is no presumption as to survivorship, but the widow's representative is entitled to the fund, in the absence of evidence that she predeceased her husband. McSherry, J., says:

From that testimony, it appears that Mr. and Mrs. Hoopes, their two children, a sister of Mrs. Hoopes, Mr. Smith, the witness, his wife and two children, were occupants of a frame house in the village of Woodvale near Johnstown; that Mr. and Mrs. Hoopes and Mr. Smith were in the parlor on the first floor on the day the disaster, and that Smith, seeing through the windows the waters rising rapidly on the outside, rushed out of the room, leaving Mr. and Mrs. Hoopes there, and made his way to the second story, where his wife and children, and the children and sister of Mrs. Hoopes, then were; that he hurried all of them up the stairway, carrying his infant in his arms, and when they reached the attic steps the roof parted and fell, killing the child he was holding, breaking his own arm, and precipitating all of them into the water. Every inmate of the house, except the witness was lost.

By the Roman law, if a father and son perished together in the same shipwreck or battle, and the son was under age of puberty, it was presumed that he died first, but, if above that age, that he was the survivor, upon the principle that, in the former case, the elder is generally the more robust, and, in the latter, the younger. The Code Napoleon had regard to the ages of 15 and 60, presuming that, of those under the former age, the eldest survived, and that, of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male was presumed to have survived; if they were of the same sex, the presumption was in favor of the survivorship of the younger. By the Mahometan law of India, when relatives thus perish together it is to be presumed that they all died at the same moment; and such also was the rule of the ancient Danish law. But the common law, which governs us knew no such arbitrary presumptions. By that law where several lives are lost in the same disaster, there is no presumption of survivorship by reason of age or sex, nor is it presumed that all died at the same moment. Survivorship in such a case must be proved by the party asserting it. No presumption will be raised by balancing probabilities that there was a survivor, or who it was. Wing v. Angrave, 8 H. L. Cas. 183; Underwood v. Wing, 4 De Gex., M. & G. 633; Johnson v. Merithew, 80 Me. 111, 13 Atl. Rep. 132; Newell v. Nichols, 75 N. Y. 78; 1 Greenl. Ev. §§ 29, 30; Best, Ev. 304; 2 Whart. Ev. §§ 1280-1282; 2 Kent, Comm. 572.

LIVERY STABLE KEEPER—LIEN FOR KEEPING ANIMAL—PRIORITY—MORTGAGE.—The somewhat disputed question as to the priority of statutory lien of an agister for keeping an animal, over a duly recorded mortgage, was decided by the Supreme Court of Indiana in Hanch v. Ripley, 26 N. E. Rep. 70, in favor of the holder of such mortgage. Berkshire, J., says:

It is not necessary to call attention to the original act, as it will throw no light upon the question under consideration. The language employed in the statute is general in its character. It does not seem to have been the intention of the legislature to do more than to create a lien in favor of the classes of persons named; and, not having expressed any intention of giving to these persons superiority over other lienholders, we think it is but fair to presume that it was the intention of the legislature to place them on a common plane with other lienholders, the first in the order of time having superiority. As the agister's lien depends alone upon the statute it can have no greater force than the statute gives it; and, as the legislature have, as we have said manifested no intention of giving to it a superiority over other liens, it can have none. And we may say in this connection that we can imagine no good reason why superiority should exist in favor of an agister over other lienholders. The lien of each rests upon a valuable consideration arising out of contract express or implied, unless it may be the general lien which the law creates when an execution is in the hands of a ministerial officer, the effect of which, as against an agister's lien, we are not now called upon to consider. The appellee loaned his money in good faith, and took a note and a chattel mortgage to secure the same; he, within the time allowed by law, had his mortgage recorded. The appellant, with notice, for he was bound to take notice, of the appellee's mortgage, under a contract with one not the owner of the property, but at most her agent, furnished his feed and services, which was but money, whereby the mortgagor became indebted to him, and to secure which indebtedness the law created a lien. Not only was the record of the mortgage notice to the appellant of the appellee's lien, but notice, also, if that were important, as to whom the property belonged. Had the appellant had actual notice of the appellee's mortgage, and, in the face of such notice, had he taken the property to keep, what plausibility would there be in his claim to superiority of lien? What equity would there be in such a claim? None whatever. With the record before him, and constructively it was before him, the notice came with the same force to the appellant as if he had actual notice, and was as effectual to him as an agister as to other classes of junior lienholders. But, if it were necessary, we might add further that one of the conditions in the appellee's mortgage was that the mortgagor should not remove the pledged property from where it was at the time the mortgage was executed, except by the consent of the mortgagee, and of this appellant had notice. We concede that there is some conflict of authority as to the construction to be placed upon statutes creating liens in favor of agisters as to whether these liens should have superiority over other specific liens senior thereto. The decisions, however, in some of the cases which seem to be adverse to our conclusion were influenced by special circumstances. See Vose v. Whitney, 7 Mont. 385, 16 Pac. Rep. 846; Smith v.

Stevens, 36 Minn. 303, 31 N. W. Rep. 55. The last case turned upon the express language of the statute of Minnesota, the statute expressly providing that the keeping at the request of the legal possessor shall be sufficient to create lien; the court holding that the mortgagee took his mortgage with a full knowledge that under the law the mortgagor might create an agister's lien upon it superior to his mortgage, and hence was bound thereby. See Hammond v. Danielson, 126 Mass. 294. But the weight of authority, and, as we think, the better reasoned cases, are in accord with the conclusion to which we have arrived. See McGhee v. Edwards, 87 Tenn. 506, 11 S. W. Rep. 316; Jackson v. Kasseall, 30 Hun, 231; Bissell v. Pearce, *supra;* Charles v. Neigelsen, 15 Ill. App. 17; Sargent v. Usher, 55 N. H. 287; Bank v. Lowe, 22 Neb. 68, 33 N. W. Rep. 482; Easter v. Goyne, 51 Ark. 222, 11 S. W. Rep. 212; Jones, Liens, §§ 691-693; Jones, Mortg. § 472.

The lien which exists in favor of one making repairs upon a vessel rests upon different principles than does a statutory lien in favor of an agister, and hence we do not think the authorities cited as to the effect of such liens are in point. In Easter v. Goyne, *supra*, it is said: "The statute under consideration does not evince the intention to give preference to the statutory lien, and, in the absence of a legislative intent to that effect, the courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage. * * * In accordance with this rule it has been decided by this court that a mechanic's lien is subordinate to a prior recorded mortgage." And so it has been held by this court as to a mechanic's lien. McCrisaken v. Osweiler, 70 Ind. 131; Close v. Hunt, 8 Blackf. 254; Troth v. Hunt, *Id.* 580. The case of Case v. Allen, 21 Kan. 217, being, as we think against the great weight of authority, and in principle against our own cases, cited above, we cannot give to it the weight that it would otherwise be entitled to receive.

DEATH BY WRONGFUL ACT—POSTHUMOUS CHILD—DAMAGES— LIMITATIONS.— In a recent editorial we discussed the question suggested by a recent Irish case as to the right of a child to bring suit against a carrier for injuries sustained while in the womb of its mother. A question of similar character arose in Nelson v. Galveston H. & S. A. Ry. Co., 14 S. W. Rep. 1021, decided by the Supreme Court of Texas. It was there held that under Rev. St. Tex., art. 2903, which provides that an action on account of injuries causing death, "shall be for the sole and exclusive benefit of the surviving children," a posthumous child may recover damages for his father's death and the fact that at the time of the death one of the parties entitled to sue was under no disability does not set the statute of limitations in motion as against such posthumous child. Hobby, J., after citing the old English cases of Thelluson v. Woodford, 4 Ves. 319; Doe v. Clark, 2 H. Bl. 399; Goodtitle v. Wood, 7 Term Rep. 103, Lancashire v. Lancashire, 5 Term Rep. 49, in effect holding that a child *en ventre sa mere* should be considered as absolutely born and *in esse* from the time of its conception says:

Such is the doctrine of cases decided in 1798, almost a century since, establishing the rights of such children to that character of property, real estate, which has been generally regarded as the most attractive and valuable over which the dominion of man has been asserted, and the ownership of which then carried with it privileges and rights frequently coveted more than the property itself. If, then, the construction of wills, devises, and statutes was such as operated to enable a posthumous child to inherit and hold property of the character described, and considered him in all respects as entitled to the rights of a child before the death of the father, can there be any reasonable doubt that the proper construction of our statute, giving the right of action to the "surviving children" of the person whose death was caused, etc. includes the plaintiff in this case, as one of such children? Had the expression "surviving children" been used in a will in the same connection as in the statute, and had it been for the benefit of the posthumous child to take, under the authorities cited it would be held to apply to him. Had the children born before the father's death been provided for by will, and it was silent as to the posthumous child, nevertheless he would not be excluded under the will because not named. The principle underlying this is that it would not be presumed that the testator intended to exclude such child from the benefits of the will merely because he had not expressly mentioned him as such, and had expressly referred to the children born before his death. There can be no stronger reason for presuming that the legislature intended to exclude a posthumous child from the benefit of article 2903 than there would be for supposing a testator, by the use of similar language, intended to exclude him. We conclude, therefore, that it was manifestly the purpose of the legislature to give the right of action, in a case like the present, to all of the surviving children of the deceased. We think, also, that the plaintiff in this case, although unborn at the time of his father's death, was in being, and one of his surving children.

Attention may also be called to the case of Railway Co. v. Thornberg, 71 Tex. 61.

SHARING OF PROFITS AS A TEST OF PARTNERSHIP.

The older English cases laid down the broad doctrine that a community in the profits of a business necessarily made a partnership. In 1775, it was stated, for the first time, that "every man who has a share of the profits of a trade ought also to bear his share of the loss."[1] Since that time, and until the decision of the well known case of Cox v. Hickman,[2] in 1862, it has been the established law of England, that all persons who share the

[1] Grace v. Smith, 2 W. Bl. 998; Waugh v. Carver, 2 H. Bl. 235; Gilpin v. Enderbey, 5 B. & Ald. 954.

[2] 8 H. L. Cas. 268.

profits of a business, incur the liabilities of partners therein, although no partnership between themselves might have been contemplated.[3] The principle was applied to cases where merchants divided the commissions received by each other on the sale of goods recommended or "influenced" by the one to the other;[4] where persons agreed to share the profits of a single isolated adventure;[5] as between persons, one of whom was in the position of a servant to the others, but was paid a share of the profits instead of a salary;[6] and between persons, one of whom was paid an annuity out of the profits made by the others,[7] or an annuity in lieu of any share in these profits.[8] And the doctrine was held to extend even to the case of a vendor and purchaser of a business, if the former guaranteed a clear profit of so much a year, and was to have all profits beyond the amount guaranteed.[9] But a share of gross returns in lieu of compensation was early held not to constitute a liability as partners, either *inter se* or as to third persons.[10] A distinction was also made between an agreement to receive as compensation a part of the profits, and an agreement to receive a sum equal to, or in proportion to a part of the profits, or, in other words, between payment out of profits as such, and payments not out of them as such, the latter being held not to constitute a partnership.[11] The originator of this distinction was Lord Eldon, who is said to have been led to make it by the impossibility of otherwise reconciling Grace v. Smith,[12] and Bloxham v. Pell.[13]

[3] Lindley on Partnership, 2nd Amer. Ed. 72.
[4] Cheap v. Cramond, 4 B. & A. 663.
[6] Heyhoe v. Burge, 9 C. B. 431.
[6] *Ex parte* Digby, 1 Deac. 341.
[7] *Ex parte* Hamper, 17 Ves. 412; *Ex parte* Chuck, 8 Bing. 469.
[8] Bloxham v. Pell, 2 Wm. Bl. 999.
[9] Barry v. Nesham, 3 C. B. 641.
[10] Wilkinson v. Frazier, 4 Esp. 182; Dry v. Boswell, 1 Camp. 329.
[11] *Ex parte* Hamper, 17 Ves. 403; *Ex parte* Langdale, 18 Ves. 300; Patt v. Syton, 3 C. B. 32.
[12] *Supra.*
[13] *Supra.* In *Ex parte* Hamper, 17 Ves. 403, his lordship says: "It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labor he shall not have a specific interest in the business but a given sum of money even in proportion to a given *quantum* of the profits, that will not make him a partner, but if he agrees for a part of the profits as such, giving him the right to an account though having no property in the capital, he is as to third persons a partner and in a question with third persons no stipulation can protect him from loss." 1 Lindley on Partnership, 2nd Amer. Ed. 85.

It will thus be seen that except in a very limited number of cases, viz: where the sharing was of gross receipts or of compensation equal to a certain *quantum* of the profits, the law was firmly established that a sharing of the net profits of an enterprise was conclusive evidence of a partnership. It is plain to be seen, also, and an examination of the cases will justify the assumption, that this doctrine was invoked in the interest simply of creditors or third persons. There could be no satisfactory reason for holding that, as between the parties themselves, the law should establish an irrebutable presumption of partnership where the parties plainly did not so intend. Therefore it is necessary, in the study of the earlier cases, to make a distinction between true partnerships and partnership as to third persons, remembering that persons having such interest in a partnership as to be entitled to a share in the profits were, with the exceptions hereinbefore noted, liable as if actual partners, on the assumption that they received part of a fund upon which creditors depended for payment, and this whether such person intended to be a partner or not, or knew that he incurred a liability.[14] The case of Cox v. Hickman,[15] however, exploded this old doctrine, and placed upon its proper footing the subject of division of profits as constituting a partnership. The House of Lords decided in that case, affirming the decision of Baron Bramwell,[16] that persons who share the profits of a business do not incur the liabilities of partners, unless that business is carried on by themselves personally, or by others as

[14] Bates on Partnership 14, says: "The injustice of this doctrine of partnership as to third persons has been more or less deplored by text writers. Moreover the illogical and untruthful foundation upon which the doctrine rests is now pretty well understood. Persons held liable as partners to third persons did not take part of the fund upon which creditors relied any more than did a salaried agent, in fact less so; for when a partnership was unable to pay its debts, it was because there were no profits and in that case such person took nothing; whereas had his compensation been definite the fraud would have been diminished." On this point Lindley says that he is unable to understand why a person lending money at a fixed rate of interest should be treated as a creditor and be exposed to no risk beyond the loss of his advance; whilst a person lending money at a rate of interest fluctuating with and payable out of the profits of the borrower should be treated as a partner and be exposed not only to the loss of his money but also the loss of whatever else he might have in the world. Lindley on Partnership, 2nd Amer. Ed. 13.
[15] *Supra.*
[16] 3 C. B. N. S. 552.

their real or ostensible agents. The lords were unanimous in treating the matter before them as a mere question of agency.[17] Leaving out of view the subtleties with which the decision of Cox v. Hickman abounds, arising out of the new question of principal and agent brought to bear upon the old question of partnership, its effect may be said to have been to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*, or unless they are his agents.[18] The decision was subsequently fortified by legislation,[19] and is therefore the settled law of England.

In order to appreciate the scope and effect of the American authorities upon this question, it would be well to bear in mind that previous to the decision of Cox v. Hickman, the old English rule which recognizes the distinction between true partnerships and partnerships as to third persons, and which gave to every agreement for a division of profits the conclusive effect of a partnership, at least as to third persons, was followed in this country. Most of the later American authorities, however, have followed Cox v. Hickman, and though not assuming in terms to overrule the earlier cases, have in fact adopted the rule of the intention of the parties as determining in each case the question of partnership. It may be said that the test of the latter is no longer actual participation in profits, but the intention of the parties, to determine which a sharing of profits, is but a factor in the evidence, and not conclusive. One thing which has, in some respects, tended to obscure the controversy, and render some of the later decisions seemingly irreconcilable, is the doctrine of "holding out" as it is called. This doctrine proceeds not upon the idea of an actual partnership *inter se*, but simply renders a person not a partner liable, as if he were one, by so conducting himself as to lead other people to suppose that he is willing to be regarded by them as if he were a partner in point of fact.[20] The ruling in the earlier cases, which made a division of profits conclusive of a partnership, at least as to third persons, proceeded somewhat upon the same basis, and for that reason many of the later cases, where the question is simply one of partnership or no partnership, and not of "holding out," recognize a distinction between a partnership as between the parties and as to third persons, having in mind the old doctrine of "holding out." Upon principle, however, it does not seem that such a distinction is tenable or proper. There can be no such thing as a partnership as to third persons when there is none between the parties, unless, of course, third persons have been misled by concealment of facts or by deceptive appearances.[21] The question, therefore, in this class of cases, is whether there was an actual partnership, and it is to be remembered that persons who are partners *inter se* are always liable as partners to third persons, and that persons who are found not to be partners as to third persons cannot be partners *inter se*. Hence, in determining what is a true partnership, authorities as to what does not constitute persons partners *inter se* are applicable.[22]

It is not our intention here to review or cite the earlier cases bearing upon this question, inasmuch as it is only within the past thirty years that the doctrine, as now established, has been developed. Of course, the sharing of profits and losses has always been recognized as the material essence of all partnerships.[23] As before shown, such agreement was, however, given a conclusive effect as to third persons

[17] A late well known writer in commenting on this decision says that "the circumstance that one person shares all the profits made by another is no doubt an important element to be considered in determining the true relation in which these persons stand to each other, but it no more conclusively shows such relation to be one of agency than it conclusively shows that the persons in question are truly partners *inter se*."

[18] 1 Lindley on Partnership, 2nd Amer. Ed. 90; Steel v. Lester, 3 C. P. D. 121.

[19] 27 and 29 Vict. Ch. 86; Holme v. Hammond, L. R. 7 Exch. 218; Pooley v. Driver, L. R. 5 Ch. Div. 458.

[20] Dailey v. Coons, 64 Ind. 545; Dodd v. Bishop, 30 La. Ann. 1178; Bowie v. Maddox, 29 Ga. 285; Fisher v. Bowles, 20 Ill. 396; Sherrod v. Langdon, 21 Iowa, 518; Bragman v. McGuire, 32 Ark. 733; Rice v. Barrett, 116 Mass. 312; Shafer v. Randolph, 99 Pa. St. 250; Harris v. Sessler, 3 S. W. Rep. 316; Rimel v. Hayes, 83 Mo. 200; Sun. Ins. Co. v. Koontz Line, 122 U. S. 583; Ala. Fertilizer Co. v. Reynolds, 79 Ala. 497; Walker v. Brown, 66 Tex. 556; Baylor Co. v. Craig Tex.), 6 S. W. Rep. 305; 1 Lindley on Partnership, 2nd Amer. Ed. 98. Upon this subject of "holding out" see an interesting article in 26 Cent. L. J. 491, by Stewart Rapalje.

[21] Beecher v. Bush, 45 Mich. 188.

[22] Bates on Partnership, 15.

[23] Scott v. Campbell, 30 Ala. 728; Morse v. Richmond, 97 Ill. 303; Aultman v. Fuller, 53 Iowa, 60; Somebry v. Buntin, 118 Mass. 279; Priest v. Chouteau, 85 Mo. 398; Jones v. Call, 93 N. C. 170; Duryea v. Witcomb, 31 Vt. 395; Nebraska R. R. Co. v. Lett, 8 Neb. 251; Culley v. Edwards, 44 Ark. 423.

in the older cases, and some recent cases still hold that a participant in profits directly as such is, as to third persons, a partner, whatever may be the arrangement between the partners, thus refusing to follow Cox v. Hickman.[24] But while it may be said that the sharing of profits is *prima facie* evidence of a partnership,[25] the strong current of authorities is that such sharing, though evidence of, is not conclusive of a partnership. Whether a partnership does or does not exist, depends on the intention of the parties under their agreement.[26] A recent New Jersey case,[27] after a careful examination of the case of Cox v. Hickman, together with cases in our own courts, reaches the conclusion that a right to receive a share of the profits of a business does not furnish an invariable test of the partnership even as to creditors; that a person not actually engaged in the business as a principal, and not holding himself out as a partner cannot be held as such unless by virtue of some contract, express or implied on his part, in legal effect, creating as between him and the persons actually carrying on the business the relation of principal and agent. A more recent decision in the same State[28] upholds this doctrine. In Harvey v. Childs,[29] the Supreme Court of Ohio decided that participation in the profits of a business, though cogent evidence of a partnership is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other. Judge Cooley, in the case heretofore adverted to,[30] laid down this principle in effect, when he said that there can be no such thing as a partnership as to third persons, when there is none between the parties. In Eastman v. Clark[31] it was held in New Hampshire that an agreement by which a person is to have a share of the profits of a business, is competent evidence of his liability as a partner in that business. But sharing profits in any other sense than sharing them as a principal, is not an absolute legal test of his liability. The question of his liability is the question whether he is a principal, bound by a contract made by himself or his agent

[24] Gill v. Kuhn, 6 S. &R. 337; Edwards v. Tracy, 62 Pa. St. 374. In this case Sharswood, J., justifies the refusal of the court to follow Cox v. Hickman, by the application of the maxim "*omnis innovatio plus novitate perturbat quam utilitate protest*," which means in plain language an old lie well stuck to is better than a new truth. See also Churchman v. Smith, 6 Whart. 148; Caldwell v. Miller, 127 Pa. St. 442. But see Hart v. Kelley, 83 Pa. St. 286. The doctrine has also been maintained in New York, Manhattan Brass Co. v. Sears, 45 N. Y. 797, and Alabama, McDonnell v. Battle House Co., 67 Ala. 90. And this effect may result though they have taken pains to stipulate among themselves that they will not in any event hold the relation of partners. Leggett v. Hyde, 58 N. Y. 272. In that case there was nominally a loan to a firm under an agreement that the money should be used in the business and that the lender should receive one-third of the profits. It was held that such understanding constituted the parties copartners as to outsiders and that the maker of the so-called loan was liable for business debts. The late case of Hackett v. Stanley, 115 N. Y. 625, still upholds and approves of this doctrine. Ruger, C. J. says: "The application of the rule that 'participation in profits' renders their recipient a partner in the business from which profits are derived as to third persons, has been somewhat restricted by modern decisions, but we think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the fruits of an adventure a liability for credits contracted in its aid, and which are essential to its successful conduct and prosecution. The principle was also recognized by the court in Atherton v. Tilton, 44 N. H. 452; but in the later case of Eastman v. Clark, 53 N. H. 276, the court adopts the modern view.

[25] Lockwood v. Doane, 107 Ill. 235; Jones v. Call, 93 N. C. 170; Eastman v. Clark, 53 N. H. 276.

[26] Harvey v. Childs, 28 Ohio St. 319; 22 Amer. Rep. 387; Smith v. Knight, 71 Ill. 148; *In re* Francis, 2 Saw. 286; 7 Nat. Bank Reg. 259; Williams v. Soutter, 7 Iowa, 435; Polk v. Buchanan, 5 Sneed. 721; Price v. Alexander, 2 G. Greene, 427; 52 Amer. Dec. 527; Hankey v. Becht, 25 Minn. 212; Canada v. Barksdale, 76 Va. 899; Reward, 2 Flipp. C. C. 422; McDonald v. Matney, 82 Mo. 358; Parchen v. Anderson, 5 Mont. 438; 51 Amer. Rep. 65; Gill v. Ferris, 82 Mo. 156; Magovern v. Robinson, 40 Hun. 166; Wright v. Canal Co., 40 Hun. 343; Gurr v. Martin, 73 Ga. 528; Monroe v. Greenhoe, 54 Mich. 9; Wells v. Babcock, 56 Mich. 276; Thayer v. Augustine, 55 Mich. 187; 54 Amer. Rep. 361; Hazard v. Hazard, 1 Story, 371; Whitney v. Ludington, 17 Wis. 140; 84 Amer. Dec. 734; Chapline v. Conant, 3 W. Va. 507; 100 Amer. Dec. 766; Meehan v. Valentine, 29 Fed. Rep. 276; Kellogg News Co. v. Farrell, 88 Mo. 594; Clifton v. Howard, 89 Mo. 192; 58 Amer. Rep. 97; Colwell v. Britton, 59 Mich. 350; Kelly v. Gaines, 24 Mo. App. 506; Bloomfield v. Buchanan, 13 Oreg. 108; St. Louis Bank v. Althoemer, 91 Mo. 190; Buzard v. First Nat. Bank (Tex.), 2 S. W. Rep. 54; Roper v. Shafer, 35 Mo. App. 30; Hart v. Kelley, 83 Pa. St. 286.

[27] Wild v. Davenport, 48 N. J. L. 129.

[28] Seabury v. Bolles, N. J. 16 Atl. Rep. 54. Many earlier American cases had recognized the doctrine so far as to hold that to constitute one a partner even as to third persons he must be a principal. Berthold v. Goldsmith, 24 How. 536; Loomis v. Marshall, 12 Conn. 69; Polk v. Buchanan, 5 Sneed. Tenn. 721.

[29] 28 Ohio St. 319.

[30] Beecher v. Bush, 49 Mich. 188.

[31] 53 N. H. 276.

acting by his authority, or whether he is estopped to deny that he is a principal within the general doctrine of estoppel. In Mepham v. Valentine,[32] it was held in one of the Federal courts that participation in profits did not constitute a partnership, though sufficient proof of it in the absence of other evidence. In Kelly v. Edwards,[33] the doctrine of Cox v. Hickman was approved by the Arkansas court. In Niehoff v. Dudley,[34] a loan on a share of profits in lieu of interest, though evidence of a partnership was held by the Illinois court not absolute, the intention being held to govern. The Supreme Court of Rhode Island, in a late case,[35] say that the later English cases are the truest expositions of the law. In Buzard v. First National Bank,[36] the Supreme Court of Texas approved the rule of Cox v. Hickman, and attempted to distinguish Cochran v. Marmaduke.[37] And the Supreme Court of Montana approves the modern English and American cases, and hold that sharing profits alone is not an absolute test, and that if there is no partnership *inter se*, there can be none as to third persons, except by "holding out."[38] Judge Story, after a thorough discussion of the subject, states the law to be that, "admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances, it remains to consider whether the rule ought to be regarded as not more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not of itself overcoming and controlling them."[39]

The sharing of profits, as above, usually means net profits. Many of the older cases recognized a distinction between the sharing of profits and of gross returns, the one being held to create a partnership, while the other did not.[40] But this distinction had its rise in the doctrine which gave conclusive effect to agreements to share profits, and with the abrogation of that rule, and the substitution of the doctrine of intention as governing each case, does not seem to be reasonable or tenable.[41] A distinction, however, going rather to the effect of evidence, and not arising by presumption of law, is made between an agreement which provides for a division of profits as such, and those which are in the nature of compensation only. In the latter case it is held in general terms that the sharing of profits, as a means of compensation for services, does not constitute a partnership.[42] A very late case in Texas[43] follows this rule, which is regarded as the soundest because supported by the better reason. The true test is: Where the interest in the profits arises from the fact that they are looked to as a fund, affording compensation for the services of the person engaged in the business, and not as property to which he has a right by reason of his being a part owner of the principal, he is in such a case not a partner.[44] In all these cases, however, it must be borne in mind that the ultimate questions are as to the real intention of the parties, and the

[32] 29 Fed. Rep. 276.
[33] 44 Ark. 423.
[34] 40 Ill. 406.
[35] Boston Smelting Co. v. Smith, 13 R. I. 27.
[36] 2 S. W. Rep. 54.
[37] 60 Tex. 370.
[38] Parchen v. Anderson, 5 Mont. 438.
[39] Story on Partnership, § 37.
[40] Turner v. Bissell, 14 Pick. 192; Everett v. Coe, 5 Den. 180; Bowman v. Bailey, 10 Vt. 170; McDonnell v. Battle House Co., 67 Ala. 90.
[41] Lindley on Partnership, 2nd Amer. Ed. 14.
[42] Leggatt v. Hyde, 58 N. Y. 272; Richardson v. Hughitt, 76 N. Y. 55; Merchants' & Planters' Bank v. Rice (Ala.), 7 South. Rep. 647; Mo. Pac. Ry. Co. v. Johnson (Tex.), 7 S. W. Rep. 838; Morrow v. Cloud, 77 Ga. 114; Holbrook v. Obearne, 56 Iowa, 325; Nicholaus v. Thielges, 50 Wis. 491; Christian v. Crocker, 25 Ark. 327: 99 Amer. Dec. 223; Meserve v. Andrews, 104 Mass. 360; Buzard v. Bank, 67 Tex. 83; Le Fevre v. Casagnio, 5 Colo. 564; Wass v. Atwater, 33 Minn. 83; Sodiker v. Applegate, 24 W. Va. 411; 49 Amer. Rep. 252; Loomis v. Marshall, 12 Conn. 69.
[43] Friedlander v. Hillcoat, 14 S. W. Rep. 786.
[44] It is upon this principle that mariners, receiving as wages a share in the profits of the cruise, are not partners, because they have no interest in the undivided profits. The case of Loomis v. Marshall, 12 Conn. 69, is a recognized leading case on this subject. F & H, lessees of a factory, agreed with M & Co., that the latter should furnish wool sufficient to supply the factory, and enable F & H to make the cloth. The expense of insurance was to be borne by the parties in proportion to their interest in the results. The expense of making was to be paid by F & H, except that of boxing the goods for market. M & Co., were to have the disposal of the goods when finished. They were to share in the net proceeds as follows: 55 per cent. to M & Co.; 45 per cent. to F & H. The contract was held to be one of hiring, and not partnership. The parties manufacturing the goods were held not to have a specific interest in the profits, as profits, but their interest arose from the agreement to pay for their labor in a certain proportion. The Supreme Court of Michigan in Kingsbury v. Thorp, 61 Mich. 217, say that the rule as above has no application to a case where the agreement is not limited as to time nor confined to a single venture where both parties contribute to the capital to be invested.

effect of their stipulations and agreements,[45] in the light of all the facts and circumstances, and that there can be no hard and fast rule or test which is absolutely decisive of every case.[46] LYNE S. METCALFE, JR.

[45] The fact that the contract may be denominated by the parties a partnership or that they may declare in it that they do not design becoming partners, is controlled by the nature of the contract. Dwinel v. Stone, 30 Me. 384; Sailors v. Nixon-Jones Printing Co., 20 Ill. App. 509; McDonald v. Matney, 82 Mo. 358; Richter v. Farrell (Penn.), 19 Atl. Rep. 687.

[46] A contract to work land, in which one has no interest, for a share of the crops held not to constitute a partnership. Donnell v. Harshe, 67 Me. 170; Musser v. Brink, 68 Mo. 242; Holloway v. Brinkley, 42 Ga. 226; Smith v. Summerlin, 48 Ga. 225; Christian v. Crocker, 25 Ark. 330; Romero v. Dalton, (Ariz.) 11 Pac. Rep. 863; Sims v. Dame, (Ind.) 15 N. E. Rep. 217; Day v. Stevens, 88 N. C. 83; But *contra:* Reynold v. Pool, 84 N. C. 37. So also a loan of money to be invested in trade the lender to have one-half the net profits. Culley v. Edwards, 44 Ark. 423; Curry v. Fowler, 87 N. Y. 33; Smith v. Knight, 71 Ill. 148; But see Parker v. Canfield, 37 Conn. 250. In the following late cases the facts were held not to establish a partnership: Runnels v. Moffat, (Mich.) 41 N. W. Rep. 224; Murphy v. Craig, (Mich.) 42 N. W. Rep. 1097; Klosterman v. Hayes, 17 Oreg. 325; Williams v. Fletcher, 21 N. E. Rep. 783; Demorest v. Koch, 9 N. Y. Supp. 726; Brown v. Watson, (Tex.) 10 S. W. Rep. 395; Rockafeller v. Miller, (N. Y.) 14 N. E. Rep. 433. In the following the facts were held to establish a partnership, Richter v. Farrell, (Penn.) 19 Atl. Rep. 687; Quinn v. Quinn, (Cal.) 22 Pac. Rep. 214; Hayes v. Vogel, 14 Daly, 486; Hyman v. Peters, 30 Ill. App. 134; Southern Fertilizer Co. v. Reames, (N. C.) 11 S. E. Rep. 467; Dame v. Kempster, (Mass.), 15 N. E. Rep. 927.

MALICIOUS INTERFERENCE WITH PERFORMANCE OF CONTRACT—RIGHT OF ACTION—DAMAGES.

CHAMBERS V. BALDWIN.

Court of Appeals of Kentucky, January 13, 1891.

A party to a contract for the sale of goods cannot maintain an action against one who maliciously, and, with design to injure him, and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

LEWIS J.: The cause of action stated in the petition of appellants is, in substance: "That, as partners doing business under the firm name of Chambers & Marshal, they made a contract with one Wise, whereby he sold, and agreed to deliver to them in good order during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee; in consideration whereof they promised to pay on delivery at the rate of five cents per pound. That they were ready, able, and willing to receive and pay for the tobacco as and at the time agreed on, and demanded of him compliance with the contract; but he had already delivered it to appellee and Newton Cooper, tobacco dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at an end. That appellee knew of the existence of said contract, but maliciously, on account of his personal ill-will to Chambers, one of the appellants, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract, whereby they have been damaged $———. That he (Wise) was at the time known by appellee to be, and now is, insolvent; so being without other redress, they bring this action. Appellee is alleged to have been actuated to do the act complained of by ill-will to one of appellants only, which, however, to avoid confusion we will treat as a malicious intent to injure both: and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus two questions of law arise on demurrer to the petition: *First*, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; *second*, whether an act lawful in itself can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not, nor could, himself break it, his wrong, if any, was in advising and procuring the equivalent of canceling and inducing Wise to do so. Consequently, while the remedy of appellants against him (Wise) was by an action *ex contractu*, recovery being limited to actual damage sustained, their action against appellee is, and could be, in no other than in form *ex delicito;* recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts (volume 1 p. 37) it is said: "Maliciously inducing a party to a contract to break his contract, to the injury of the person with whom the contract was made, creates that conjunction of wrong and damage which supports an action." The authority cited in support of the proposition thus stated, without qualification, is the English case of Lumley v. Gye, 2 El. & Bl. 228, decided in 1853, followed by Bowen v. Hall, decided in 1881, and reported in 20 Amer. Law Reg. (N. S.) 578, though it is proper to say there was a dissenting opinion in each case. The action of Lumley v. Gye was in tort, the complaint being that the defendant maliciously enticed and procured a person, under a binding contract to perform at plaintiff's theater, to refuse to perform and abandon the contract. The majority of judges held, and the case was decided upon the theory, that remedies given by the common law in such cases are not in terms limited to any description of servants or service; and the action could be maintained upon the principle, laid down in Comyn's Digest, that, "in all cases where a man has a temporal loss or damage by the wrong

of another, he may have an action upon the case to be repaired in damages." The position of Justice Coleridge was to the contrary—that, as between master and servant, there was an admitted exception to the general rule of the common law confining remedies by action to the contracting parties, dating from the statute of laborers, passed in 25 Edw. III., and both on principle and authority limited by it; and that "the existence of intention, that is, malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequences."

We have been referred to some American cases as being in harmony with the two cases mentioned. In Walker v. Cronin, 107 Mass. 555, it was held that where a contract exists by which a person has a legal right to continuance of service of workmen in buisiness of manufacturing boots and shoes, and another knowingly and intentionally procures it to be violated, he may be held liable for the wrong, although he did it for the purpose of promoting his own business. But it was not alleged the defendant in that case had any such purpose in procuring the persons to leave and abandon the employment of the plaintiff; the real grievance complained of being damage by the wanton and malicious act of defendant and others. In Haskins v. Royster, 70 N. C. 601, it was held that if a person maliciously entices laborers or croppers on a farm to break their contract, and desert the service of their employer, damages may be recovered against him. But both those cases relate to rights and duties growing out of the relation of employer and persons agreeing to do labor and personal service, and do not apply here, except so far as the decisions rest upon other grounds than the statute of laborers. In Jones v. Stanley, 76 N. C. 355, it was however held, that the same reasons which controlled the decisions rendered in Haskins v. Royster "cover every case in which one person maliciously persuades another to break any contract, with a third person. It is not confined to contracts for service." But we have not seen any other case in which the doctrine is stated so broadly. Chesley v. King, 74 Me. 164, we do not regard at all decisive, because the court went no further than to say they were inclined to the view that there may be cases where an act, otherwise lawful, when done for the sole purpose of damage to a person, without design to benefit the doer or others, may be an invasion of the legal rights of such person. Cooley on Torts, 497, agreeing with Justice Colebridge says: "An action cannot, in in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it seems to us that the rule harmonizes with both principle and policy, and to it there can be safely and consistently made but two classes of exception; for, as to make a contract binding, the parties must be competent to contract and do so freely, the natural and reasonable presumption is that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English statute of laborers to apply where apprentices, menial servants, and others, whose sole means of living was manual labor, were enticed to leave their employment, and may be applied in this State in virtue of and as regulated by our own statutes. The other arises where a person has been procured against his will, or contrary to his purpose, by coercion or deception of another to break his contract. Green v. Button, 2 Cromp. M. & R. 707; Ashley v. Dixon, 48 N. Y. 430. But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his own will, and for his own benefit. And his voluntary and distinct act, not that of appellee being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him.

That an action on the case will lie whenever there is concurrence of actual damage to the plaintiff, and wrongful act by the defendant, is a truism, yet, unexplained, misleading. The act must not only be the direct cause of the damage, but a legal wrong, else it is *damnum absque injuria*. But whether a legal wrong has been done for which the law affords reparation in damages depends upon the nature of the act, and cannot be consistently or fitly made to depend upon the motive of the person doing it; for an act may be tortious, and consequently actionable, though not malicious, nor even willful. If it was not so, there could be no reparation for an act of pure negligence, though ever so hurtful in its effects. And it is just as plain that an act which does not of itself amount to a legal wrong, without, cannot be made so by, a bad motive accompanying it; for there is no logical process by which a lawful act, done in a lawful way can be transformed or not into a legal wrong according to the motive, bad or good, actuating the person doing it. The proposition is clearly and forcibly stated in Jenkins v. Fowler, 24 Pa. St. 308, as follows: "Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful. Where a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justfication. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the parties were friends cannot be made the foundation of an

action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts." In Frazier v. Brown, 12 Ohio St. 294, the cause of action stated was diversion, with malicious intent, by the defendant of subterraneous water on his own land from adjoining land of the plaintiff; but it was held there could be no recovery, because, as said by the court, "the act done, to-wit, the using of one's own property, being lawful in itself, the motive with which it is done—whatever it may be as a matter of conscience—is, in law, a matter of indifference." In Chatfield v. Wilson, 28 Vt. 49, the action was for the same cause substantially, and the language of the court was: "An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it." In Mahan v. Brown, 13 Wend. 261, the complaint was that the defendant wantonly and maliciously erected on his own premises a high fence near to and in front of plaintiff's window, without benefit to himself, and for the sole purpose of annoying the plaintiff, thereby rendering her house uninhabitable. But it was held the action would not lie, because, no legal right of the plaintiff having been injured, the defendant had not so used his property as to injure another, and, whether his motive was good or bad, she had no legal cause of complaint. To the same effect is the decided weight of authority in the United States. Adler v. Fenton, 24 How. 412; Phelps v. Nowlen, 72 N. Y. 39; Benjamin v. Wheeler, 8 Gray, 410; Iron Co. v. Uhler, 75 Pa. St. 467; Plank-Road Co. v. Douglass, 9 N. Y. 444.

Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant Chambers, or by a stranger, though he might have profited by the purchase to the damage of appellants; for competition in every branch of business being not only lawful, but necessary and proper, no person should, or can upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other. Nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser. Competition frequently engenders, not only a spirit of rivalry, but enmity; and, if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered. As pertinently inquired in Plank-Road Co. v. Douglass, "Independently of authority, if malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is this principle to stop?" And as correctly said by Lord Coleridge in Bowen v. Hall: "The inquiries to which this view of the law [making an act lawful or not according to motive] would lead, are dangerous and inexpedient inquiries for courts of justice. Judges are not very fit for them, and juries are very unfit." In our opinion, no cause of action is stated in the petition, and the demurrer was properly sustained. Judgment affirmed.

NOTE.—The very limited number of cases to be found in the books involving the question considered in the principal case, is indicative of a general belief that such an action does not lie, although it may, in part, be ascribed to a disinclination on the part of people generally to interfere with the contract rights of others. The cases of Lumley v. Gye, and Bowen v. Hall, cited by the court, may be said to have established the doctrine in England, contrary to the view of the Kentucky court. If, after the decision of Lumley v. Gye, any doubt remained as to whether its effect was restricted to cases wherein the actual relation of master and servant existed, it was settled by the case of Bowen v. Hall, where the court after a careful scrutiny of the former case, came to the conclusion that in order to sustain such an action, it was not necessary that the contracting parties should stand in the strict relation of master and servant. It followed necessarily from the reasoning of the court in that case, and the conclusion was predicated upon the proposition, that a breach of any contract maliciously induced or procured by a third person to the damage of one of the contracting parties, will give to the latter, a right of action.

The dissenting opinions of Sir John Coleridge and Lord Coleridge in the first and second of the above cases were, at the time, regarded with some favor, prompted largely by the reputation and recognized ability of those jurists; but it is now generally thought that their view was wrong and that the malicious interference with the performance of any contract is actionable, provided that actual damage, such as might have been anticipated as the natural result of the interference, ensues. This doctrine has been affirmed in later cases in England, and within the period of a few months, in the case of De Francesco v. Barnum, where the great American showman was mulcted in damages for enticing away from the plaintiff, certain ballet dancers, theretofore engaged by the plaintiff, or rather for continuing to retain their services after notice of the prior contract. In passing, it may be well to state that the extent to which the doctrine was carried in that case, there being no evidence of an actual malicious enticement, subjected it to considerable criticism, even at the hands of the supporters of the general doctrine. This question has arisen with more frequency in the cases of unwarrantable or malicious interference with contracts for personal services, and there are but few cases which involve any other form of contract. But inasmuch as Bowen v. Hall, and other cases have sustained such contracts, even where the strict relation of master and servant does not exist, there is no reason on principle why the doctrine should not extend to cases involving general contracts as there is nothing especially in the features of a contract for personal services, which should warrant such holding. There are abundant authorities

even in this country that an action will lie by a person against any one who knowingly and willfully entices away his servant, minor child, or apprentice, or wrongfully prevents him from performing his duty during the existence of that relation. Walker v. Cronin, 107 Mass. 555; Bixby v. Dunlap, 56 N. H. 456; Plummer v. Webb, 4 Mason, 380; Stowe v. Heywood, 7 Allen 118: Sherwood v. Hill. 3 Sumn. 127: Ames v. Union Railway Co., 117 Mass. 541; Noice v. Brown, 38 N. J. L. 569; Woodward v. Washburn, 3 Den. 369; Jeter v. Blocker, 43 Ga. 331. And where defendant has wrongfully entered the plaintiff's premises to entice away his servants, it has been held that trespass *quare clausum fregit* will lie, and the loss of the servants may be shown in aggravation of damages. Haight v. Badgeley, 15 Barb. 499. In some of the above cases it may be said that the relation of master and servant strictly speaking existed but, in most of them, not. And the question whether in order to sustain such an action the relation of master and servant strictly speaking should exist, has been decided both ways. See Haskins v. Royster, 70 N. C. 601; Burgess v. Carpenter, 2 Rich. S. C. 7, where both views are stated. It is essential of course that the apprentice or servant be under an existing contract, duty or relation with or to the master, to remain in his employment, which contract or duty the defendant has induced the servant to violate. And therefore it has been held that no action lies against one for merely inducing a servant to leave his employer at the end of his present contract with him, even though the latter desired and intended to re-employ him. Boston Glass Manufactory v. Binney, 4 Pick. 425; Nicol v. Martyn, 2 Esp. 732. And it has also been held that if the servant or employee has already left that service without the defendant's influence, and then for the first time is employed by the defendant, the latter is not liable for enticing him away whether liable or not in any other form of action if he continues to employ him after notice. Butterfield v. Ashley, 2 Gray, 254; Caughey v. Smith, 47 N. Y. 250; Sargent v. Mathewson, 38 N. H. 54; Everett v. Sherfey, 1 Iowa, 356. The remedy by injunction in equity to enforce the specific performance of contracts for personal services is well understood and will not be adverted to here. For a list of the important authorities on that question see 30 Cent. L. J. 229. In the case of Boulier v. McCauley, 15 S. W. Rep. 60, which was also decided by the Kentucky court, and follows, in the reporter, the decision of the principal case, the question was as to a right of action against a theater manager for maliciously enticing Mary Anderson to perform at another theater in derogation of a contract previously made with the plaintiff. There was a case where, as in many of the English cases, a strict relation of master and servant did not exist, and yet which involved some features of a personal service or personal employment. And yet the court in that case, refused to adopt the doctrine upon the same ground taken in the principal case, and it was held that the action did not lie even under a statute of that State, providing that any person who lawfully entices another to break a contract of service, shall be liable to the person injured, upon the ground that such statute was intended to apply principally to farm laborers and could not be extended in its application so as to include contracts for performance of dramatic artists. The ground upon which these cases were decided by the court were that to maintain an action upon the case at common law, the act upon which it is founded must not only amount to a legal wrong but be the proximate cause of the loss or damage sustained and that upon principle and according to the decided weight of authority in the United States, whether a legal wrong has been done or not depends upon the nature and quality of the act, and not upon the motive of the person doing it, citing Jenkins v. Fowler, 24 Pa. St. 308, where it is said that "malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful." And also Cooley on Torts, 497, who takes the position that such an action as is here contended for, does not lie because the consequence after all is only a broken contract for which the party thereto may have his remedy by suing upon it. So far as American authorities are concerned the only cases in which the question has been squarely presented have been decided in favor of such right of action. Walker v. Cronin, 107 Mass. 555; Haskins v. Royster, 70 N. C. 601; Jones v. Stanley, 76 N. C. 355; Chesley v. King, 74 Me. 164. In view of the holding of the Kentucky court in the Macauley case, authorities like Walker v. Cronin, and Haskins v. Royster, which were in some measure contracts for personal services, are authorities against the general doctrine of the Kentucky court, which holds that even in a case where the relation of master and servant exists, such an action does not lie. The reasoning of the court upon principle, claiming that the act of inducing the breach of a contract is not a legal wrong and not the proximate cause of the loss or damage sustained, is only a restatement of the views of the dissenting judges in the cases of Lumley v. Gye, and Bowen v. Hall, and in the minds of many is a subtlety not founded upon substantial grounds. The reason for a right of action in such case as this, has been put upon the general ground that every wrongful act which produces actual injury to another, such injury being its natural and probable consequence is actionable. There is good reason for contending as laid down by Brett, L. J., in the case of Bowen v. Hall, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another and which in the particular case does produce such an injury, an action on the case will lie. If these conditions are satisfied the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person or because such act so done by the third person is a breach of duty or contract by him or an act illegal on his part or an act otherwise imposing an actionable liability on him. Of course the act of the defendant which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact. But if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury issue from it. It cannot be doubted that a malicious act such as above described is a wrongful act in law and in fact. The act complained of in the present case is therefore because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence but by the terms of the proposition, which involves the success of the persuasion, it is the actual consequence. And unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly in point

of fact that the breach of contract is too remote a consequence of the act of the defendant.—[EDITOR.]

RECENT PUBLICATIONS.

BLACK ON JUDGMENTS.

The subject of this work is of great and growing importance and for this reason, together with the fact that the treatise heretofore considered in the lead, upon the same subject, is now nearly ten years old, is sufficient justification, if any is necessary, for the present treatise. Mr. Black, the author, though comparatively a young man, has already demonstrated his ability to handle intricate subjects satisfactorily, and in his published works on "Tax Titles" and "Constitutional Prohibition" has evinced such an aptitude for the discussion and elucidation of legal questions as leads one, at the outset, to look favorably upon any work that may come from his hands. But the present may be said to be more pretentious than any he has undertaken. There is no more complicated or difficult subject, or one upon which authorities clash, with more frequency, than that of judgments. This is especially the case in that branch which is known as estoppel by record, and questions of *res adjudicata* are in many phases legal puzzles. The author therefore undertook a difficult task and one, which candor compels us to say, had been treated in so satisfactory a style by Mr. Freeman as to have given him, in part, his well deserved reputation as a law writer. It is not our intention to institute a comparison between this work and that of Mr. Freeman on the subject, though we will say that the former would not suffer by it. But this much we are obliged to admit, that the work of Mr. Black is newer by ten years, and therefore contains all the later questions and the newest authorities up to date. The present work is in two large volumes and necessarily contains more than the one volume of Mr. Freeman.

An examination of the present work will impress one with the exceeding and painstaking care exhibited by the author and the accuracy which prevades throughout. It is evidently not thrown together haphazard, but the result of much thought and indefatigable labor. And it is not, what is so common now a days among law writers, a mere digest of cases, but the author goes to the bottom of questions to weigh and balance the conflicting decisions, not withholding criticism when he deems it justified nor refraining from the positive expression of individual opinion. It is impossible, in this review, to give the reader any idea of the contents of the book except from the above opinion reached by us after a careful study of the work; though perhaps a concise statement of its contents may be of interest. The chapters in their order treat of the nature and classification of judgments and decrees, final and interlocutory judgments and decrees, judgments by confession, by default, arrest of judgment, rendition and entry of judgments, judgments *nunc pro tunc*, amendment of judgments, validity of judgments, impeachment of judgments, vacating and opening judgments, relief in equity against judgments, the lien of judgments, and their revival by *scire facias*, all treated in the first volume. Volume two treats of estoppel by judgment and the doctrine of *res adjudicata*, former recovery as a bar, judgments *in rem*, foreign judgments, judgments of courts of sister States, assignment of judgments, actions upon judgments and payment and satisfaction of judgments.

We believe that Mr. Black is one of the "coming" law writers of this country, if he has not already "come," and that this work, able, exhaustive and accurate, will grow in value, as its merits reveal themselves.

Ten thousand cases are cited and there is a very good index. The mechanical execution of the work is not so good.

HIRSCHL'S LEGAL HYGIENE.

This little book of nearly two hundred pages, is evidently designed for clients instead of lawyers, as the author says it teaches "how to avoid litigation." A practitioner cannot be expected to take any interest in that sort of a work. And to indicate further its almost absolute worthlessness to lawyers the author recklessly says the book "is of interest to all persons who have property or expect to acquire any." A facetious person would say this barred the legal fraternity. Nevertheless the book contains much that will interest practitioners and we advise them quietly to buy and read it, even if they have to keep it locked up when clients are about. The book is prepared on the theory that "an ounce of prevention is worth a pound of cure" and is prompted by the author's belief that what "our clientelle most requires is to be taught how to avoid litigation." He says the sanitary principles underlying business conduct, in other words the Legal Hygiene, are not to be learned from books, but from practical experience. Hence this book which is intended as a guide in the acquisition of the latter. It is impossible, beyond this, to give an intelligent idea of what the book contains, as it is of general character. There is considerable originality of ideas and there are many good points. To a lawyer, there is nothing substantially new except in its treatment which is interesting. Indeed the style of the author, which is bright and vivacious, is its chief merit.

LAWSON'S RIGHTS AND REMEDIES, VOL. 7.

The successful completion of this series of what might be called condensed text books is a matter of congratulation not only to the author and publisher, but also to the legal fraternity, who have found it of positive and real value. It is no easy matter to collate and condense the almost entire mass of substantive law into seven volumes, and this Mr. Lawson has succeeded in doing in as satisfactory a manner as could be done. As a matter of fact, the discriminating critic could easily find some things to condemn. For instance, it may be said that in many respects the books are mere digests of cases and lack the element of original treatment; that the author does not go into the niceties of questions but contents himself with the mere statement of general principles. But these faults, if they may be so called arise in large part from the nature of the work and not from the manner of its treatment. It would not be possible within the space of seven volumes to treat each subject as exhaustively and thoroughly as is usual in ordinary text-books. And this, we take it, was not the aim; but on the contrary it was designed simply to give the leading principles pertaining to the different subjects with a citation of all the important cases. The present volume which is the last except the index volume, concludes the general subject of remedies and procedure, and embraces also the subject of public rights and remedies. Within the former are discussed actions and defenses at common law, in equity, and changes effected by codes of procedure; joinder of causes of action, parties to actions under

code practice, pleading, defenses, set-off, counter-claim and cross complaint. It discusses the general remedy of attachment, in what actions and for what causes it will lie, the affidavit and attachment bond, the writ and levy, and dissolution of the attachment. There are special chapters on garnishment, replevin, trespass and trover, account stated, *assumpsit*, injunction, ejectment and conflict of laws. Under public rights and remedies are discussed constitutional law in general, legislative powers, statutes, judicial power, public offices and officers, their qualification, tenure, appointment and removal, citizenship, and, within the subject of impairment of contracts and property rights, eminent domain and police power. Then follows the subject of municipal corporations, their powers and liabilities, officers, ordinances and by-laws, and liability for torts. The work concludes with the subjects of *mandamus* and *quo warranto*.

QUERIES ANSWERED.

QUERY NO. 3.

(*To be found in Vol. 32 Cent. L. J. p. 150.*)

The legislature of the State has paramount authority over streets. O'Conner v. Pittsburg, 18 Pa. St. 187. It may however, and often does, authorize this power to be exercised by the municipal authorities. The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restrictions, vacate or discontinue the public easement in them or invest municipal corporations with this authority. Gray v. Iowa Land Co., 26 Iowa, 387; Baird v. Rice, 63 Pa. St. 489. In the absence of such delegation of power by the legislature a municipal council has no such right. *Ibid.*

M.

HUMORS OF THE LAW.

"Do you think you will gain your lawsuit?" asked Gus Smith of Colonel Yerger, who had been run over by a fire-engine, and was suing the city of Austin for damages. "Yes, I think I'll come out ahead." "Has your lawyer given you grounds to think so?" "No, but I have given him ground to think so, I've deeded him two lots on Austin Avenue as a fee."—*Texas Siftings*.

Ex-Judge Harmon was in Virginia not long ago. He stopped at a hotel. The day was rainy, He had written a letter, but had no stamp. The post-office was four blocks removed and the road was muddy. In the office he saw a Virginia gentleman, one of the "great unreconstructed," affixing some stamps to letters he had written. He returned a number of stamps to his box. "Could you tell me where I could get a stamp?" Judge Harmon asked tentatively. "Certainly, sah," the "colonel" replied, not comprehending the hint; "you'll find them at the post-office, sah, and the man who sells them is a confounded radical, sah, a radical!" "I shall never buy a stamp of him, then," said Judge Harmon, drawing himself up proudly. "Good sah," the "colonel" exclaimed. "I am glad to hear you say so' sah! You're a man after my own heart. Help yo'self, sah; help yo'self," he said, enthusiastically, proffering the judge his stamp box. The judge is a diplomat—even in Virginia.

A great lawyer named Hardin, of Kentucky, argued a case in chancery in one part of the circuit. He got a decree in his favor. Some seventy-five miles away, in another part of the circuit, he appeared before the same Judge on the other side of the same proposition. The Judge said to him, "Brother Hardin, were you not before me on this point in another part of this circuit about thirty days ago?" "Yes, sir. If your Honor pleases," replied Hardin, "I was." "Well," said the Judge, "did you not take the other side of this proposition then?" "Yes," said Hardin, "but a man can learn a heap of law in thirty days."

The picturesque Counselor Garvey is not always successful in his cases, but at times he knows how to turn the tables very effectually on a judge whose opinion does not coincide with his. An amusing incident occurred a number of years ago, when Judge Lindley was on the bench, Garvey had a case before him, and Judge Lindley made a ruling that practically amounted to throwing the counsellor's client out of court. After a gasp of surprise Mr. Garvey asked: "Am I correct in understanding that the court has ruled against me?" "You are sir," answered Judge Lindley. Garvey again repeated the question, and with some heat the Judge informed him that if he understood the English language he certainty understood that the ruling was adverse: "Well, well," said Garvey with a sigh of resignation, and with his strongest brogue, "I hope, for the credit of the court, it will never be noised abroad." A roar of laughter greeted this retort, in which the judge heartily joined.

A Southwest Georgia justice of the peace had listened to the evidence in a case that was being tried before him, and when that had been concluded, one of the lawyers arose to make a speech in favor of his client. The judge listened patiently half an hour, and then began writing on a piece of paper in front of him. A few minutes later he interrupted the lawyer by saying: "Gentlemen, when you finish your speeches you will find my decision written on this piece of paper. You will have to excuse me for a while, as I have to plant some potato-slips. Let me know when you have concluded, and I will return and sentence the prisoner."

In an attack directed against the character of a witness, the examining counsel came off second best:—"You were in the company of these people?" "Of two friends, sir." "Friends! two thieves, I suppose you mean?" "That may be so," was the dry retort; "they are both lawyers."—*Green Bag*.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ABATEMENT OF ACTION—Dissolution of Corporation.—Under Rev. St. Ohio, §§ 5679, 5680, a suit in equity in a federal court, wherein the corporation has been declared insolvent, and a receiver appointed to administer its property as a trust fund for the benefit of creditors, need not be revived as against a receiver appointed by a State court, which has dissolved the corporation during the pendency of the proceedings in the federal court.—*Lake Superior Iron Co. v. Brown, Bonnell & Co.*, U. S. C. C. (Ohio), 44 Fed. Rep. 539.

2. ACCIDENT INSURANCE—Intentional Act.—A clause in an accident insurance policy exempting the company from liability for "intentional injuries inflicted by the insured or any other person" precludes a recovery when the insured has been killed by the intentional act of another.—*Travelers' Insurance Co. v. McCarthy*, Colo., 25 Pac. Rep. 713.

3. ADMINISTRATION — Probate Jurisdiction.— Under Code Ala. 1886, sec. 1910, the probate court has jurisdiction to determine whether a widow is entitled to dower, and a bill asking that administration be removed from the probate court, upon the ground that it has no such jurisdiction, will not be upheld.—*Espall v. Dolan*, Ala., 8 South. Rep. 491.

4. ADULTERATING MILK—Coloring Matter.—Under St. Mass. 1886, ch. 318, amending Pub. St. Mass. ch. 57, § 5, punishing the sale of milk "to which water or any foreign substance has been added," a person may be convicted who sells skimmed milk colored by adding to it annatto.—*Commonwealth v. Wetherbee*, Mass., 26 N. E. Rep. 414.

5. ADVANCEMENTS—Evidence.—After a decree that an intestate had made no advancements to any of his children, the discovery of a memorandum of "donations" to his children, in the handwriting of the intestate, is not sufficient to warrant the court in reopening the case.—*Hubbard v. Brooks*, Ga., 12 S. E. Rep. 648.

6. APPEAL—Freehold.—Where, in a suit for the specific performance of a contract to buy land, it is conceded that the purchaser had the legal title, and the only contention is whether his title is unmerchantable, because of an alleged inchoate right of dower and a recorded contract alleged to constitute a cloud on the title, a "freehold" is not involved in the suit, within the meaning of the Illinois statute regulating appeals.—*Goodkind v. Bartlett*, Ill., 26 N. E. Rep. 387.

7. APPEAL—Habeas Corpus.—From an order of the district court discharging a person from arrest on *habeas corpus* no appeal lies under Organic Act Utah Territory, § 9, and 2 Comp. Laws Utah 1888, §§ 3635, 5134. —*Mead v. Metcalf*, Utah, 25 Pac. Rep. 729.

8. ASSAULT AND BATTERY—Instruction.—In a prosecution for assault and battery, an instruction requested by the defendant that the jury must acquit if they find that "defendant intended to commit a violent injury on the person of the prosecutor, but afterwards voluntarily desisted therefrom," is properly qualified by adding, "before doing any act towards carrying out such intention.—*Bishop v. State*, Ga., 12 S. E. Rep. 641.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment wherein the assignee accepts the trust, and agrees "to execute the same by disposing of the property, * * * and applying the proceeds to the payment of said debts," does not by implication authorize the assignee to sell on credit, which would invalidate it, under 2 Comp. Laws Utah, § 2838.—*Sprecht v. Parsons*, Utah, 25 Pac. Rep. 730.

10. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Preferences.—In Indiana, an insolvent debtor may give valid mortgages to one or more of his *bona fide* creditors, though on the following day he makes a general assignment for benefit of creditors.—*Carnahan v. Schwab*, Ind., 26 N. E. Rep. 67.

11. ASSIGNMENT OF INDIAN CLAIM.—An assignment by an Indian nation of a part interest in a claim held by it against the United States, made in accordance with the provisions of section 2103, Rev. St. U. S., and a subassignment made in accordance with the provisions of section 2106, are not prohibited or rendered invalid by section 3477 of those statutes.—*Dexter v. Meigs*, N. J., 21 Atl. Rep. 114.

12. ASSUMPSIT — Money Had and Received.—Where money belonging to plaintiff was paid to defendant as administrator for one who would have been plaintiff's sole heir had he been dead, under the belief that plaintiff was dead, and defendant knew nothing to put him on inquiry which would have resulted in learning that plaintiff was alive, he is not liable for portions of such money paid out for his decedent's estate before he learned that plaintiff was alive, but is liable for such balance as was then in his hands.—*Beam v. Copeland*, Ark., 14 S. W. Rep. 1094.

13. ATTACHMENT—Evidence.—Where the creditor of a firm attaches its stock of goods after it has been transferred to the wife of one of the members in payment of a pre-existing indebtedness to her on the trial of her claim to the goods, a letter from the firm to her attorney, admitting their indebtedness to her, is admissible in evidence.—*Bell v. Kendall*, Ala., 8 South. Rep. 492.

14. ATTACHMENT—Unlawful Business.—Notwithstanding that property wrongfully attached is unlawfully used in an unlicensed retail liquor business, its owner can recover its value.—*Smith v. Dinkelspiel*, Ala., 8 South. Rep. 490.

15. AWARD—Mistake.—Where an arbitrator has made an award in plaintiff's favor, it is no defense to an action thereon that he afterwards made an order reopening the case and fixing a day to hear evidence on account of mistakes charged by defendant, it not being shown that there were in fact any mistakes in the making of the award.—*Robison-Rea Manuf'g Co. v. Mellon*, Penn., 21 Alt. Rep. 91.

16. BAIL—Liability After Conviction.— Upon a recognizance for the appearance of the principal to answer the charge of assault and battery and not depart without leave of the court, the bail is not bound for the appearance of the principal at a term of the court subsequent to that at which he was tried, convicted, and sentenced.—*Roberts v. Gordon*, Ga., 12 S. E. Rep. 648.

17. BANKS—Insolvency — Preference.—Section 4429 of the Code (Act 1833) is a special statute of the State of Georgia with reference to banks, intended to prohibit preference by a bank insolvent at the time or in contemplation of insolvency, which preferences might be legal in the case of other insolvent debtors under the act of 1818.—*Hill v. Western & A. R. Co*, Ga., 12 S. E. Rep. 635.

18. BUILDING CONTRACT.—Where a building contract provides that payments shall only be made upon certificate from the architect that the work is done in accordance with the speficications, allegations in a suit, by the contractor, that he demanded such certificates from the architect, who fraudulently refused to give them, and that the building has been completed in strict accordance with the specifications, are sufficient if sustained by proof, to relieve the contractor from showing that he procured the certificates.—*Michaelis v. Wolf*, Ill., 26 N. E. Rep. 384.

19. CARRIERS—Passengers on Freight Trains.—It is not within the apparent scope of the employment of a conductor on a train used exclusively for transporting

freight to invite persons to ride on his train; and one who accepts such an invitation, with no intention to pay fare, is not a passenger.—*Powers v. Boston & M. R. Co.*, Mass., 26 N. E. Rep. 447.

20. CARRIERS — Scalpers' Tickets.—Full fare may be collected of a passenger attempting to ride on a scalper's ticket conditioned to be void if presented by any other than the original holder, notwithstanding the passenger purchased it on the assurance of an unauthorized agent of the company that it would be honored.—*Drummond v. Southern Pac. Co.*, Utah, 25 Pac. Rep. 733.

21. CARRIERS OF PASSENGERS—Sleeeping Car Company.—In an action against a sleeping car company for money stolen from a person while asleep, it appeared that the only man kept on the car while it ran from New York to Boston, making eight stops on the way, was a man who acted as conductor, porter and bootblack, held that defendant had not exercised due care in protecting its passenger while asleep.—*Carpenter v. N. Y., etc. R. Co.*, N. Y. 26 N. E. Rep. 277.

22. CONFLICT OF LAWS—Devise.—Laws N. Y. 1860, c. 360, providing that no person having a husband, wife, child, or parent shall devise or bequeath to any benevolent, charitable, or religious association more than half of his or her estate, applies to testators resident in that State, and does not limit the capacity of New York corporations to take under devises from testators residing in Massachusetts, where there is no such law.—*American Bible Soc. v. Healey*, Mass., 26 N. E. Rep. 402.

23. CORPORATIONS—Subscription to Stock.—Where the holders of stock issued in consideration of property transferred to the corporation transfer their stock to a trustee for the benefit of the corporation, to be by him sold or donated to subscribers to corporate bonds, such subscribers are not liable on the stock on the ground that it has been issued to them contrary to the provisions of Const. Ala. art. 14, § 6, and Code 1886, § 1662.—*Davis v. Montgomery Furnace, etc. Co.*, Ala., 8 South. Rep. 496.

24. CRIMINAL PRACTICE—Burglary.—The husband is head of the house, though the ownership be in the wife. Where both reside together in a house belonging to her, it may described as his house in an indictment for burglary.—*Yarborough v. State*, Ga., 12 S. E. Rep. 650.

25. CRIMINAL PRACTICE—Complaint—Arabic Numerals.—It is no ground for quashing a complainant that it designates by Arabic numerals the date on which the offense was committed, since these may now be considered as part the English language, and an allegation that the offense was committed "on the 26th day of July in the year of eighteen hundred and ninety" is sufficient.—*Com. v. Smith*, Mass., 26 N. E. Rep. 436.

26. DECEIT—Identification of a Payee.—A bank which ignorantly pays money to the holder of an instrument upon the faith of a third person's statement that he knows the holder to be the payee, and is afterwards compelled to pay the amount to the true payee, may recover the sum from the third person in an action of deceit.—*Lahay v. City Nat. Bank of Denver*, Colo., 25 Pac. Rep. 764.

27. DEDICATION.— Conveyances herein held to constitute no dedication of the land in the streets.—*Pitts v. Mayor*, 21 Atl. Rep. 52.

28. DESCENT AND DISTRIBUTION — Heirs. — A granddaughter who, in the right of her deceased mother, sets up a claim against an alleged trustee of personal property belonging to her grandfather's estate, cannot maintain the action when it appears that by reason of a will, whose terms are not shown, no interest in the estate came to her mother until the death of testator's wife.—*Hall v. Cowles' Estate*, Colo., 25 Pac. Rep. 705.

29. DEVISE — Charitable Trust. — A devise of certain real estate to the "first Presbyterian church of Astoria:" *Held*, a charitable trust against the testator's heirs although there was no such church or society in Astoria at the time of testator's death.—*Pennoyer v. Wadhams*, Oreg., 25 Pac. Rep. 720.

30. EJECTMENT—Grants of Public Land.—Where, under a grant of public lands to aid in the construction of a canal, a selection is made of lands which had been appropriated under a prior grant, and so were not subject to selection under the later one, a subsequent act of congress confirming the lands to the canal company does not relate back to the date of selection so as to enable that company to maintain ejectment for the lands brought before the passage of the confirming act.—*Lake Superior Ship-canal, etc. Co. v. Cunningham*, U. S. C. C. (Mich.), 44 Fed. Rep. 587.

31. EJECTMENT — Pleading. — Where a complaint in ejectment demands possession of the whole thereof, and $500 damages, allegations, in a replication to a plea to the jurisdiction, on the ground of the amount in controversy, that plaintiff claims only a part of the premises, and nominal damages, constitute a departure, and should be stricken out on defendant's motion.—*Logiodice v. Gannon*, Conn., 21 Atl. Rep. 100.

32. EJECTMENT — Res Adjudicata. — A judgment in ejectment against a tenant in possession is binding on his landlord and on a purchaser from the landlord pending suit, where the landlord and purchaser have actual knowledge of the suit, and assist in defending it.—*Thomsen v. McCormick*, Ill., 26 N. E. Rep. 373.

33. EQUITY—Injunction—Estoppel.— One who is about to sue on a judgment which is void for want of proper service is entitled to a decree enjoining the judgment debtor from setting up its invalidity, when it appears that the latter, while obtaining a discharge in bankruptcy, secured substantial benefits by contending that the judgment was valid, and would not be bound by his discharge.—*Wakelee v. Davis*, U. S. C. C. (N. Y.), 44 Fed. Rep. 532.

34. EQUITY—Jurisdiction—Auxiliary Bill.— After there has been a final decree and confirmation of sale in a suit for the partition and sale of land, an auxiliary bill seeking to set aside as fraudulent a contract made by the parties after the final decree, and attacking the proceedings in that suit on the ground of want of proper service and other irregularities, cannot be maintained, since there is a complete remedy at law.—*Yeatman v. Bradford*, U. S. C. C. (Tenn.), 44 Fed. Rep. 536.

35. ESTOPPEL—By Conduct.—Where a portion of the purchase money of a void sale of land is invested for and enjoyed by heirs who afterwards bring ejectment for the land, the heirs are not estopped from maintaining their action, unless it be shown that they enjoyed said purchase money knowing it to be such.—*Spencer v. Feichtel*, Penn., 21 Atl. Rep. 73.

36. EVIDENCE—Letters.— Copies of letters addressed by plaintiffs to defendant, its solicitors, and others, unaccompanied by proof of the mailing of the originals, or their receipt by the persons to who addressed, are inadmissible in evidence.—*Huckenstein v. Kelly & Jones Co.*, Penn., 21 Atl. Rep. 78.

37. EXECUTION— Amendment. — The power to amend an execution is vested in the court, but its exercise must always be in furtherance of justice. — *Flint v. Phipps*, Oreg., 25 Pac. Rep. 725.

38. EXECUTION— Dormant Judgment. — Under Code Ala. § 3364, providing that a justice's judgment cannot be revived by *scire facias* after five years from its rendition, and section 2615, subd. 9, declaring that no action can be brought on such judgments after six years, an execution issued more than five and less than six years from the rendition of the judgment is irregular but not void.—*Draper v. Nixon*, Ala., 8 South. Rep. 489.

39. EXECUTION—Sale—Fraud.—In an action to rescind the execution sale of a saw-mill on the ground of fraud practiced by the execution creditor and for the rent of the mill while it was in his possession, it is admissible to show what rent defendant obtained for the mill.—*McCauley v. Murphy*, Ga., 12 S. E. Rep. 655.

40. EXECUTION SALES—Redemption.—Under Gen. St. Colo. 1883, § 1851, the payment of the money by defend-

ant, with the purpose of redemption, to the sheriff who sold the land on execution, and its receipt by the latter without objection, nullifies and abrogates the sale, as between defendant and the purchaser, though the sheriff has not formally canceled the certificate of purchase, nor directed the execution of a certificate of redemption.—*Colorado Manuf'g Co. v. McDonald*, Colo., 25 Pac. Rep. 712.

41. EXECUTOR'S SALE—Stifling Competition.—A widow who induces the creditors of her deceased husband to stay away from the executor's sale of the personalty by her representation that she will bid a designated sum for the property, and who bids it off for a smaller amount, and at much less than its actual value, acquires no valid title, and the sale will be set aside.—*Anderson v. Pedigo*, Ind., 26 N. E. Rep. 397.

42. EXECUTORS AND ADMINISTRATORS—Distribution.—Where an administrator pays to an heir more than his share of the estate because he is misled as to the amount of the assets on account of an excessive valuation of the deceased's share of the property of a firm, as shown by the inventory made by the surviving partner, he may recover the payment from the heir by suit, since the mistake is one of fact.—*Stokes v. Goodykoontz*, Ind., 26 N. E. Rep. 391.

43. EXECUTORS AND ADMINISTRATORS—Title to Personal Property.—At common law the legal title to all personal property of the deceased vested in the executor or administrator with absolute power to dispose of it, and, in the absence of fraud or collusion between him and the person to whom he transferred it, the creditors or next of kin could not follow it into the hands of the alienee.—*Weider v. Osborne*, Oreg., 25 Pac. Rep. 715.

44. EXEMPTIONS—Who May Claim.—A judgment debtor who disclaims ownership of the land levied on, and affirms that it belongs to his wife, cannot, after the sale, claim his exemption in the proceeds, under Code Md. art. 83, § 10.—*Miles v. State*, Md., 21 Atl. Rep. 51.

45. EXPERT TESTIMONY—Mental Capacity.—On an issue as to the mental capacity of the grantor to execute a deed, an expert may be asked, after an hypothetical statement of the facts, whether in his opinion such a man would have "the usual and ordinary capacity for the transaction of the business of life."—*Poole v. Dean*, Mass., 26 N. E. Rep. 406.

46. FRAUDS—Statute of—Agreements not to be Performed Within a Year.—A contract whereby plaintiff is to trade defendant's lands for other lands, to manage the lands thus acquired, and to resell them and the timber thereon for a compensation of half the profits after paying defendant his advances, is not within the statute of frauds invalidating agreements not to be performed within a year.—*Durham v. Hiatt*, Ind., 26 N. E. Rep. 401.

47. FRAUDS—Statute—Trusts—Evidence.—The third section of the statute of frauds does not require that trusts of land shall be created by writing, but only that they shall be manifested and proven by that means; and for this purpose letters or other documents, written long after the creation of the trust, are sufficient.—*Newkirk v. Place*, N. J., 21 Atl. Rep. 124.

48. FRAUDULENT CONVEYANCES—Evidence.—A party may interrogate his own witness by direct questions for the purpose of contradicting previous adverse testimony. To invalidate a purchaser's title to property on the ground that the purchase was made in fraud of the rights of creditors, it is necessary to prove that the vendor made the conveyance with intent to hinder, cheat, or defraud his creditors, and also that the vendee was cognizant of such fraudulent intent in making the purchase.—*Grimes v. Hill*, Colo., 25 Pac. Rep. 698.

49. GAME LAWS—Seizure—Conversion.—The game commissioners have no power to authorize their deputy o seize and carry away rabbits which are exposed fort ale in violation of Acts Mass. 1886, ch. 276, § 5, and in so doing the deputy is liable as for a conversion to his own use.—*Averill v. Chadwick*, Mass., 26 N. E. Rep. 441.

50. GUARDIAN OF INCOMPETENT—Judgment.—An action cannot be maintained against the guardian of an incompetent person upon a note made by the latter, when the latter is not joined or served with summons, and judgment entered by default will be set aside.—*Justice v. Ott*, Cal., 25 Pac. Rep. 691.

51. GUARDIAN'S SALE—Collateral Attack.—Where the question as to a guardian's sale of lands of his ward arises collaterally, and the pleadings do not attack the proceeding for want of jurisdiction, and where the record discloses jurisdiction, both of the parties and the subject-matter, the sale will be sustained.—*McCullough v. Estes*, Oreg., 25 Pac. Rep. 724.

52. INSURANCE—Arbitration.—Under an insurance policy, which provides that any difference as to the amount of loss shall be submitted to arbitration, and that no action shall be maintained on the policy until after an award, a cause of action does not accrue in favor of the insured by a waiver of formal proofs of loss by the company, and the presentation to it of an estimate by a third person of the amount of the loss.—*Hutchinson v. Liverpool, etc. Ins. Co.*, Mass., 26 N. E. Rep 439.

53. INSURANCE—Compromise.—Upon a dispute arising between insurer and insured as to the amount of loss, a written agreement was entered into, fixing the amount of loss and of insurance, whereupon the insurer orally agreed to pay part of the amount of the insurance within 60 days, such amount to be received in full satisfaction: *Held*, that the oral agreement was not inconsistent with the written agreement, and was valid.—*Millers' Ins. Co. v. Kinneard*, Ill., 26 N. E. Rep. 368.

54. INTOXICATING LIQUORS—Civil Damage Suit.—Under a statute allowing exemplary damages in such cases, it is proper to instruct the jury that they may, if they find for plaintiff, assess her damages at such sum as they think from the evidence she ought to recover, not exceeding the *ad damnum*, where the evidence shows sales made to plaintiff's husband while drunk.—*Kennedy v. Sullivan*, Ill., 26 N. E. Rep. 382.

55. INTOXICATING LIQUORS.—Under the decision of the Supreme Court of the United States, an importer of intoxicating liquors, into any State from any other State or country, could, by himself or agent, prior to the passage of the "Wilson bill," sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to the laws of the State into which such liquors were imported, and without regard to the size of the packages.—*State v. Winters*, Kan., 25 Pac. Rep. 235.

56. JUDGE—Resignation.—When a county judge resigns it is his duty, without demand therefor, to turn over to his successor in office all moneys and effects which have come into his hands in the execution of the duties of his office, so far as the same have not been applied to legitimate purposes.—*Clelland v. McCumber* Colo., 25 Pac. Rep. 700.

57. JUDGMENT—Collateral Attack.—A judgment by confession in a court of general jurisdiction in another State cannot, when regular on its face, be collaterally attacked.—*Kingman v. Paulsen*, Ind., 26 N. E. Rep. 393.

58. LEASE—Construction.—A lease providing that lessees should be liable for all damage other than by fire or by reason of any act done by him. The lessee also covenanted to surrender the premises in as good condition as when received excepting ordinary wear and tear: *Held*, that the lessee was not liable for injuries arising from its imperfect construction.—*Machen v. Hooper*, Md., 21 Atl. Rep. 67.

59. LEASE—Option to Buy.—Where a tenant takes a lease with an option to extend it from year to year, and also to buy the land at the end of any year, at a price to be fixed by the lessor during the year, the fact that the clause containing the option to buy is by agreement omitted from a lease for the second year, but

with a mutual understanding that the option is to continue, does not deprive the tenant of his right to exercise the option under the second lease.—*Abbott v. Seventy-six Land & Water Co.*, Cal., 25 Pac. Rep. 693.

60. LEASE—Waiver of Exemptions.—A waiver in a lease of "the benefit of all laws or usages exempting any property from distress or executions for rent" applies to any property, whether seized upon a landlord's warrant, or levied upon by an execution for rent.—*Beatty v. Knoxville Land Imp. Co.*, Penn., 21 Atl. Rep. 74.

61. LIFE INSURANCE—Forfeiture—Premiums.—Where a policy provides that, if the quarterly premiums are not paid at maturity, it shall cease, and that the acceptance of any premium after maturity shall not be a waiver of payment of the future premiums when due, and that no person except the president and secretary, acting together, shall have power to alter the contract or waive forfeitures, the acceptance of three previous premiums after maturity, and the promise of the agent, after the maturity of another premium, to accept it if paid before a certain date, constitute no binding waiver of the forfeiture incurred by the failure to pay at maturity.—*Lantz v. Vermont Life Ins. Co.*, Penn., 21 Atl. Rep. 80.

62. LIMITATION OF ACTIONS—National Banks.—Actions by the receiver of a national bank against the stockholders for assessments on the stock are subject to the State statutes of limitations.—*Butler v. Poole*, U. S. C. C. (Mass.), 44 Fed. Rep. 587.

63. LIMITATIONS—Infancy.—Act Ga. March 16, 1869, declaring that all causes of action accrued prior to June 1, 1865, should be barred unless suit was brought by January 1, 1870, does not apply to an heir's right of action against the administrator, when the heir was an infant, and had no guardian until 1866, as his right of action did not accrue until such appointment.—*Monroe v. Simmons*, Ga., 12 S. E. Rep. 643.

64. MANDAMUS—Canvassing Election Returns.—Under Pub. St. Mass. ch. 7, §§ 26, 40, 48; *Id.* ch. 28, § 21, and St. 1885, ch. 229, the functions are purely ministerial, and they are bound by the returns, and cannot be compelled by *mandamus* to receive and count a return of the votes cast in a town when the return does not show in what year nor in what town the election was held.—*Luce v. Board of Examiners*, Mass., 26 N. E. Rep. 419.

65. MARRIED WOMAN—Contract—Surety.—A married woman who negotiates a loan in the absence of her husband, and who actually receives the money from the lender on her representation that she desires it for her own use, with no knowledge on his part that it was for the use of any other person, and who, with her husband, executes a note, and a mortgage on her separate property as security, is the principal debtor, and not a surety for her husband, though the money was in fact afterwards applied for his use.—*Bouvey v. McNeal*, Ind., 26 N. E. Rep. 396.

66. MASTER AND SERVANT—Contributory Negligence—Injuries to Servants.—A laborer employed to load cars at night at defendant's coal chutes, and who has been so employed for several nights, so that he is familiar with the premises, knows the location of the chutes, and is accustomed to operate the cars, cannot recover for injuries occasioned by being caught between a chute and a moving car on which he was standing.—*Quibell v. Union Pac. Ry. Co.*, Utah, 25 Pac. Rep. 734.

67. MASTER AND SERVANT—Negligence.—Where an employer places an employee as foreman in charge of a piece of work requiring several days' labor, away from his own factory, and of such a nature as may reasonably be supposed to require the use of appliances for raising and lowering a heavy piece of iron, but does not furnish such appliances, the foreman has implied authority to provide blocks and tackle by borrowing or otherwise, and if he uses insufficient ones, whereby a workman under his control, without fault on his part, is injured, the employer is liable.—*Telander v. Sunlin*, U. S. C. C. (Minn.), 44 Fed. Rep. 564.

68. MEASURE OF DAMAGES—Breach of Contract.—In an action for breach of contract to convey land against a vendor, who neither had title at the time he made the contract nor acquired it afterwards, the vendee's damage is the difference between the contract price and the value of the property at the time the conveyance should have been made.—*Dunshee v. Geoghegan*, Utah, 25 Pac. Rep. 731.

69. MORTGAGES—Extinguishment.—Where the holder of the legal title mortgages the property in order to pay off prior incumbrances, and subsequently pays the mortgage through another in order to release his general property from execution issued on judgment taken on the mortgage bond, and has the judgment marked to the use of the person paying it, the mortgage is not extinguished, but may be enforced by the holder of the judgment against the property which is primarily liable for the payment of the mortgage debt.—*Borland v. Stokes*, Penn., 21 Atl. Rep. 86.

70. MORTGAGES—Foreclosure.—Under Code Ga., providing that a creditor having a lien on two funds equally accessible shall be compelled to pursue the one on which other creditors have no lien, *held* that a mortgage creditor whould not be compelled to relinquish his claim on the funds in controversy and make his debt out of land of which he held a defeasible deed.—*Vance v. Roberts*, Ga., 12 S. E. Rep. 653.

71. MORTGAGES — Foreclosure. — Where a mortgage contains a power of sale on default, also an agreement to pay attorney's fees in foreclosure if it is necessary to entitle the complainant to recover such attorney's fees, the bill should aver some fact showing why such form of foreclosure is necessary.—*Bedell v. New England Mortgage Sec. Co.*, Ala., 8 South. Rep. 494.

72. MUNICIPAL CORPORATION—Fire Regulations.—Under the facts, *held* that the improvements made were repairs and not the building of an addition within the meaning of an ordinance forbidding the erection of any building whose outer walls were not composed of materials specified by the ordinance or approved by the fire wardens.—*Borough of Stamford v. Studwell*, Conn., 21 Atl. Rep. 101.

73. MUNICIPAL CORPORATIONS—Public Improvements.—Rev. St. Ill. ch. 24, art. 9, § 1, which empowers cities and villages to make local improvements by special taxation, does not authorize them to provide in that way for the erection of a railroad bridge across a city street.—*City of Bloomington v. Chicago & A. R. Co.*, Ill., 26 N. E. Rep. 366.

74. MUNICIPAL TAXATION — Assessments.—The functions of the city council, in reference to the reduction of assessments made by the board of assessors, are explicitly defined, and limited by the terms of the law, and action in excess thereof is *ultra vires*, and void.—*Board of Liquidation v. Thoman*, La., 8 South. Rep. 482.

75. NEGLIGENCE—Dangerous Premises.—A landlord who contracts with a plumber to perform work requiring excavations about the premises is liable for injuries sustained by visitor to one of the tenants from falling into an excavation negligently left unguarded by the contractor, though it was so near the usual pathway as to render it unsafe.—*Curtis v. Kiley*, Mass., 26 N. E. Rep. 421.

76. NEGOTIABLE INSTRUMENTS—Indorsement.—A person, not a party to a negotiable promissory note, who places his name on the back thereof after its execution and delivery, before maturity and before it has been indorsed by the payee, is, as to subsequent *bona fide* holders, an indorser of the paper.—*Buck v. Hutchins*, Minn., 47 N. W. Rep. 808.

77. NEGOTIABLE INSTRUMENTS—Indorsers.—A bank which had discounted a note had, when it matured, funds of the maker on deposit applicable to the note, and sufficient to pay it; but the maker, who conceived that he had a defense against the payee, induced the bank not to charge the note to his account, but to bring suit thereon against the payee, who was also indorser: *Held*, that the indorser was discharged by the bank's failure to collect the note out of the funds of the maker

in its hands.—*German Nat. Bank of Allegheny City v. Foreman*, Penn., 21 Atl. Rep. 20.

78. PARTNERSHIP—Taxes.—The individual members of a partnership are distinct from the partnership. Where a partnership, which is a particular one, owes taxes, and the partnership is dissolved, each of the partners owes one-half the tax.—*Rivers v. City of New Orleans*, La., 8 South. Rep. 484.

79. PRACTICE IN CIVIL CASES.—Under Laws Mass. 1885, ch. 384, the time for entering a writ made returnable on the first Monday of a month cannot be extended beyond the next succeeding regular return-day.—*Dudley v. Keith*, Mass., 26 N. E. Rep. 442.

80. PROCESS—Service.—There being but one suit, one petition, one defendant, the clerk has no power, without some direct and express order of the court, to issue more than one process. A second process issued by him of his own will, after the appearance term of the case is void.—*Peck v. La Roche*, Ga., 12 S. E. Rep. 638.

81. PROCESS—Service—Publication.—Service by publication on defendants in a mechanic's lien action, based on an affidavit by plaintiff, sworn to before his attorney, to the effect that defendants are non-residents, but not stating that a cause of action exists against them, or that they are necessary or proper parties to the action, as required by Code Civil Proc. Colo. ch. 3, § 44, is insufficient to confer jurisdiction.—*Frybarger v. McMillen*, Colo., 25 Pac. Rep. 713.

82. PROCESS—Service by Publication.—Under Pub. St. Mass. ch. 147 § 33, it is within the discretion of the probate judge to fix the length of time between the last publication and the return-day, and an order fixing two days as that time is sufficient.—*Osgood v. Osgood*, Mass., 26. N. E. Rep. 413.

83. QUIETING TITLE—Pleading.—On a bill to quiet title complainant must affirmatively allege and prove possession of the premises.—*Livingston v. Hall*, 21 Atl. Rep. 49.

84. RAILROAD COMPANIES — Crossings—Negligence.—The mere fact that plaintiff was injured by a train at a railroad crossing is not of itself sufficient to entitle him him to recover damages therefor against the railroad company, but the burden is on him to show by a preponderance of evidence that the accident was due to some negligence on the part of the company.—*Griffith v. Baltimore & O. R. Co.*, U. S. C. C. (Ohio), 44 Fed. Rep. 574.

85. RAILROAD COMPANIES—Imputed Negligence.—The negligence of the employees on the passenger trains, contributing to the accident, cannot be imputed to the passenger, nor will his relation to the carrier company compel him to resort to it, to the exoneration of defendant. Overruling Lockhart v. Lichtenthaler, 46 Pa. St. 151, and Railroad Co. v. Boyer, 97 Pa. St. 91.—*Bunting v. Hogseth*, Pa. 21 Atl. Rep. 31.

86. RAILROAD COMPANIES — Receiver's Certificates—Estoppel.—Where, by consent of all parties, the receiver of a railroad company, though not engaged in operating the road, is authorized by order of court to issue certificates which shall constitute a lien on the company's property superior to certain prior mortgages, and the money obtained on such certificates is used in preserving and improving the property, the purchasers of the property, at subsequent sale to foreclose said mortgages are estopped from denying the validity of the certificates.—*Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co.*, U. S. C. C. (Ala.), 44 Fed. Rep. 526.

87. REMOVAL OF CAUSES—Citizenship.—Under Act Cong. March 3, 1887, § 2, as amended by Act Aug. 13, 1888, where the only ground of jurisdiction in the federal courts is that a controversy between citizens of different States, and it appears that there is but one controversy, and but one party on either side, defendant cannot remove the suit to the federal courts if it is brought in a court of the State of his residence.—*Bryan v. Richardson*, Mass., 26 N. E. Rep. 435.

88. REMOVAL OF CAUSES—Citizenship—Corporations.—Notwithstanding the consolidation of two railroad corporations of different States, each retains its identity as a corporation of the State in which it was originally created; and in a suit against the consolidated corporation brought in one of such States, it cannot obtain a removal to the federal courts on the ground that it is a citizen of the other State, though the consolidation was had under the laws of the latter.—*Paul v. Baltimore & O. & C. R. Co.*, U. S. C. C. (Ind.), 44 Fed. Rep. 513.

89. REMOVAL OF CAUSES—Residence—Foreign Corporation.—The fact that, in compliance with Rev. St. Ind. 1881, § 3765, a foreign corporation doing business within the State has appointed a resident agent upon whom process may be served, does not constitute it a resident of the State; and, on being sued in a State court, it may assert its non-residence, and claim a removal to the federal court, under Act March 3, 1887.—*Amsden v. Norwich Union Fire Ins. Co.*, U. S. C. C. (Ind.), 44 Fed. Rep. 515.

90. REMOVAL OF CAUSES—Local Prejudice—Time of Application.—Under Act Cong. Aug. 13, 1888, which provides that removals on the ground of prejudice or local influence may be had "at any time before the trial," the removal is not too late if the case, though it has been once decided, is yet to be tried *de novo* in the appellate tribunal before a jury.—*Brodhead v. Shoemaker*, U. S. C. C. (Ga.), 44 Fed. Rep. 518.

91. RES ADJUDICATA—False Imprisonment.—A judgment on a writ of *habeas corpus* remanding the prisoner is not a bar to a subsequent action by him for false imprisonment for the same cause.—*Bradley v. Beetle*, Mass. 26 N. E. Rep. 429.

92. SALE OF LAND—Representations.—Where at the auction of a lot the auctioneer states that it contains a certain number of square feet, and that its lines are a certain length as ascertained by actual measurement made by him with the owner's husband, her agent, who is present at the auction, a bidder who relies on the statements of the auctioneer, though he is familiar with the premises, can maintain an action to recover a part payment, when it turns out that the lot contains several hundred square feet less.—*Roberts v. French*, Mass., 26 N. E. Rep. 416.

93 SEAMEN—Contract.—Where a vessel is bound on a two-years' voyage, touching at many ports, a provision in the shipping articles that any seamen who terminates his contract before the end of the voyage shall only receive one dollar per month as wages is reasonable.—*The Topsy*, U. S. D. C. (S. Car.), 44 Fed. Rep. 631.

94. SLANDER—Words Actionable Per Se.—To say of another he is a thief is actionable *per se*.—*Roberts v. Ramsey*, Ga., 12 S. E. Rep. 644.

95. SPECIFIC PERFORMANCE—Description.—An option on "one-half interest of [the vendor] in horses and ranch" is capable of specific enforcement, as the ranch may be identified by extrinsic evidence.—*Easton v. Thatcher*, Utah, 25 Pac. Rep. 729.

96. STATE LEGISLATURE—Impeachment of Speaker.—The speaker of the house of representatives is not a State officer, and is not liable to removal by impeachment.—*In re Speakership of The House of Representatives*, Colo., 25 Pac. Rep. 707.

97. STATUTES—Repeal by Implication—A new statute, revising the whole subject-matter of an old one, and evidently intended as a substitute for it, although there is no clause to that effect, will operate as a repeal of the old law.—*Little v. Cogswell*, Oreg., 25 Pac. Rep. 727.

98. STREET RAILWAYS—Duty to Repair Pavement.—A street railway company, required by ordinance to keep the pavement along its track in repair, is not responsible for a hole in the pavement under one rail of its track, made by direction of the city to serve as a surface drain, and maintained in the condition required by the city as to size and repair.—*Campbell v. Frankford, etc. Ry. Co.*, Penn., 21 Atl. Rep. 92.

99. TAXATION—Double Assessment.—Under Pol. Code Cal. § 3649, money deposited with a county treasurer by order of court in a pending case may be doubly assessed if it "escaped assessment" the year before.—*City of San Luis Obispo v. Pettit*, Cal., 25 Pac. Rep. 694.

100. TAXATION—Exemptions.—Real property belonging to a county, used for private purposes, and from which the county receives rent, is not exempt from taxation.—*Inhabitants of County of Essex v. Board of Assessors*, Mass., 26 N. E. Rep. 431.

101. TAXATION—Personal Property.—Where a resident of one county owns a portable saw-mill and yoke of oxen which he keeps in another county for three years the property is taxable in the latter county.—*Trammel v. Connor*, Ala., 8 South. Rep. 495.

102. TAXATION—Redemption—Notice.—Under Rev. St. Ill. ch. 120, § 216, which requires the notice of expiration of redemption from tax-sale to show, among other things, "for what year taxed or specially assessed," a notice which fails to specify whether the sale was for taxes or special assessment is fatally defective.—*Gage v. Dupuy*, Ill., 26 N. E. Rep. 386.

103. TAXATION — Shareholders — Exemptions. — The assessment of shares for the purpose of taxation of the shareholders is not subject to deduction of bonds exempt from taxation.—*Home Assur. Co. v. Board of Assessors*, La., 8 South. Rep. 481.

104. TAXATION—Street Improvements.—School property is not liable to assessment for a street improvement; nor can a judgment be rendered against a board of education for the payment of the assessment out of its contingent fund.—*City of Toledo v. Board of Education*, Ohio, 26 N. E. Rep. 403.

105. TAX-TITLES—Possession.—Rev. St. Ill. ch. 120, § 129, which provides that, when real property has been forfeited to the State for taxes, the county clerk shall add to the taxes for the current year the tax for which such property was forfeited, does no authorize the clerk, where a tract of land which has been forfeited for taxes is afterwards subdivided into lots, to divide such taxes, and extend the several parts upon such lots.—*Mecartney v. Morse*, Ill., 26 N. E. Rep. 376.

106. TOWNS—Maintaining Electric Light Works.—In Massachusetts, under the existing statute relative to the powers of towns, a town has no authority to construct and maintain electric light works for the purpose of lighting its streets, and furnishing its inhabitants with light at reasonable rates.—*Spaulding v. Inhabitants of Town of Peabody*, Mass., 26 N. E. Rep. 421.

107. TRIAL—Challenge of Jurors.—That a person called as a juror is acquainted with the attorney of one of the parties to the suit, and had employed him at one time to do certain legal business, is not sufficient ground upon which to base a challenge for cause.—*Fairbanks v. Irwin*, Colo., 25 Pac. Rep. 701.

108. TROVER AND CONVERSION—Damages.—The return of the property after conversion is no bar to the action, but is admissible in mitigation of damages. In such a case, the plaintiff will not recover the value of the goods, but the damages he has sustained by the wrongful act, which was the conversion.—*Bigelow Co. of New Haven v. Heintze*, N. J., 21 Atl. Rep. 109.

109. VENDOR AND VENDEE — Brokers.— Where real estate brokers on making a sale give the vendee a receipt for the first payment, signed by themselves, as agents, in which it is stated that "it is agreed that in case the title proves to be not good this $1,000 will be refunded by us," they are personally liable to the vendee in case of failure of title, even though the contract of sale signed by the vendor contains a similar provision.—*Mead v. Altgeld*, Ill., 26 N. E. Rep. 388.

110. VENDOR AND VENDEE—Contract.—In an action on a contract to buy land, which is set out in the complaint, a finding by the court that plaintiff "entered into an agreement in writing with defendant * * * whereby plaintiff agreed to sell and defendant agreed to buy said land upon the terms and conditions set forth in plaintiff's complaint, and plaintiff's Exhibit No. 2," is a sufficient finding that defendant executed the contract.—*Smith v. Mohn*, Cal., 25 Pac. Rep. 696.

111. VENDOR AND VENDEE—Time of the Essence.—Time is not of the essence of a contract for the sale of real estate, unless made so by the express agreement of the parties, or by the nature of the contract itself, or of the circumstances under which it was made.—*Frink v. Thomas*, Oreg., 25 Pac. Rep. 717.

112. WAYS—Declaration.—Though Code Ga. § 731, provides that "when a person has laid out a private way, and has been in the use and enjoyment of it as much as seven years, of which the owners have had six months' knowledge, without moving for damages, his right to use becomes complete," there is no law authorizing the board of county commissioners to declare a private way permanent, and their attempted action in so doing will be reversed on *certiorari*.—*Herndon v. Strickland*, Ga., 12 S. E. Rep. 642.

113. WAYS—Right—Necessity—Release.—A release by deed, by the owner of the dominant estate to the owner of the servient estate, of his right of way thereover, is valid, notwithstanding the dominant estate is entirely surrounded by the servient estate and other land, and there is no presumption that there was an intention to reserve a right of way out of the very right of way that is released.—*Richards v. Attleboro Branch R. Co.*, Mass., 26 N. E. Rep. 418.

114. WIFE—Alienating Affections.—In an action for alienating the affections of plaintiff's wife, and causing her to separate from him, by statements which are not alleged to be false, defendants may deny that their statements did alienate the wife's affections, and may show that they did not intend to cause a separation and that they acted honestly, intending only to befriend both husband and wife.—*Tasker v. Stanley*, Mass., 26 N. E. Rep. 417.

115. WILLS—Construction.—A devise to testator's wife "to her use and behoof forever, giving her power to expend the property for her support and maintenance during her life-time," and providing that "so much of said estate as remains unexpended at the time of her decease" shall be disposed of in a specified manner, gives the wife power to dispose of the property and use the proceeds only so far as is necessary for her reasonable maintenance during life.—*Chase v. Ladd*, Mass., 26 N. E. Rep. 429.

116. WILLS — Construction.—A will devising all of testator's property to his wife, with "full power to sell and convey the same by deed, (part or all of it), the proceeds to be used for her comfort and otherwise as she may think proper," and on her death the portion remaining undisposed of to go to testator's sons, does not create a fee-simple estate in the wife, but only a life-estate, with power to convey the fee by deed.—*Kent v. Morrison*, Mass., 26 N. E. Rep. 427.

117. WILLS—Construction.—Testator devised his farm to his son D, providing that his widow should have a home there while she lived; and he further provided that his son J, who was strong of body but weak of mind, should remain on the farm with D and the widow, "who should care for him in all his actual wants:" *Held*, that this does not impose a charge on the land for J's support.—*In re Pringle's Estate*, Penn., 21 Atl. Rep. 79.

118. WILLS—Construction.—Under a clause in a will, "I give and bequeath to my wife all my personal property, both real and personal," the wife took a fee in the testator's lands.—*Morgan v. McNeeley*, Ind., 26 N. E. Rep. 395.

119. WILLS—Power.—A devise of an estate to testator's widow for life, with remainder to such of testator's children and grandchildren as she shall by will appoint, and, in default of such appointment, the estate to pass as if testator had died intestate, creates only a special power in the widow to apportion an absolute estate in the remainder among such of testator's children and grandchildren as she sees fit.—*Myers v. Safe Deposit & Trust Co.*, Md., 21 Atl. Rep. 58.

120. WILLS—Revocation—Marriage.—Under the Code of Georgia, the marriage of a woman revokes a will, previously executed by her, in which no provision is made in contemplation of such an event.—*Ellis v. Darden*, Ga., 12 S. E. Rep. 652.